

Before the
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Washington, D.C.

In the matter of:

The Digital Performance Right
in Sound Recordings and
Ephemeral Recordings
CRB DTRA

Docket No.
2005-1

(Webcasting Rate Adjustment
Proceeding)

Volume XLV

Room LM-414
Library of Congress
First & Independence Avenue, S.E.
Washington, D.C. 20540

Tuesday,
November 28, 2006

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30
a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

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P-R-O-C-E-E-D-I-N-G-S

9:34 a.m.

CHIEF JUDGE SLEDGE: Good morning. We'll come to order.

MR. SMITH: Your Honor, I placed the Kessler books there on your table and the SoundExchange at this time calls Barrie Kessler.

Whereupon,

BARRIE KESSLER was called as a witness by Counsel for SoundExchange and having been first duly sworn, assumed the witness stand and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q Ms. Kessler, you've testified here before in this proceeding, but would you remind the Judges of what position you hold at SoundExchange?

A Yes, I'm the Chief Operating Officer of SoundExchange.

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1 Q And what are your areas of
2 responsibility in that position?

3 A I'm responsible for the oversight
4 of all the collection and distribution
5 functions, compliance and enforcement,
6 systems development and then management of
7 the staff.

8 Q Now, let me start today with
9 questions responsive to the testimony of the
10 Broadcasters about whether the current rate
11 is preventing entry into the marketplace of
12 webcasting.

13 Why don't you turn back to the
14 exhibit in your book, Exhibit 22RR? Do you
15 see that?

16 A Yes, I do.

17 Q Can you tell me what this is?

18 A This is a receipt report for
19 webcasters for the years 2004, 2005 and
20 through July of 2006.

21 Q This is a SoundExchange document?

22 A Yes, it is.

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1 Q Now, you said it's a receipt
2 report for webcasters. Is it limited to
3 webcasters?

4 A Yes, it is.

5 Q And just for the sake of clarity,
6 does it include NPR payments for this time
7 period?

8 A No, it doesn't and we haven't
9 received a payment from NPR since 2004.

10 Q So, where it says numbers of
11 services that would not include any NPR
12 stations?

13 A It does not include NPR stations.
14 No.

15 Q Okay. Now, let me ask you first
16 to look at the section 1 on page 1 of
17 Exhibit 22RR and ask you if you could, what
18 does this document reflect about the overall
19 growth in webcasting over that three-year
20 time period?

21 A In terms of dollars on the total
22 line in 2004, we go from about 10.5 million

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1 up to 14.8 million in 2005 and through July
2 of 2006, we're up to about 9.5 million. So,
3 if you annualize that, that could be as much
4 as 18 million at that point.

5 In terms of the services, we grow
6 from 430 in 2004 to 623 in 2005 and up to
7 788 in 2006. So, this demonstrates
8 tremendous growth in both terms of the
9 numbers of services as well as the royalties
10 received.

11 Q Now, this dollar figures that you
12 reported, would they include any payments
13 made by webcasters pursuant to the terms of
14 direct licenses they may have negotiated
15 with particular record companies?

16 A No, it would not.

17 Q Now, how would this rate of
18 growth in revenue relate to a growth in
19 listener-ship to webcasting over the same
20 time period?

21 A There's a direct corollary
22 between the dollar value and the amount of

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1 consumption. Because all but the
2 subscription services pay on an aggregate
3 tuning hour basis or per performance basis
4 which measures that usage.

5 Q Now, if you could, just tell us
6 what subcategories of webcasters you then
7 have information about in the remaining
8 parts of the document?

9 A In section 2, we have the non-
10 subscription commercial services, a further
11 breakout for the broadcast simulcasters, the
12 new subscription services, the eligible non-
13 transmission services and a category called
14 other.

15 Q Okay. Now, focusing on
16 simulcasters, what does this document show
17 about the growth in terms of number of
18 simulcasters and the amount of revenue
19 they're paying to SoundExchange?

20 A In 2004, we had 81 services
21 increasing to 217 for 2005 and a further
22 increase in 2006 up to 294.

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1 In terms of receipts, 2004, we
2 had 1.4 million almost \$3 million in 2005
3 and through July of 2006 almost \$2 million.

4 Q Okay.

5 A So, again, it shows growth.

6 Q The 294 figure, does that fully
7 capture all of the stations that may be
8 simulcasting and paying royalties to
9 SoundExchange?

10 A No, it does not. In the case of
11 a broadcast group like a Clear Channel, they
12 may submit a single payment and they would
13 be counted once and so, the hundreds of
14 channels that they're paying on behalf of
15 would not be reflected in this figure.

16 Q Okay. Now, could you report as
17 well on the growth in the first category
18 non-subscription commercial webcasters over
19 the same three year period?

20 A Yes, in terms of actual numbers
21 of services, we go from 114 in 2004 to 277
22 in 2005 and up to 400 through July of 2006

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1 and in terms of total receipts, we go from
2 \$5.3 million in 2004 to 11.2 million in 2005
3 and again, through July of 2006, \$6.8
4 million.

5 Q Okay. Let's turn to a different
6 topic then, Ms. Kessler, which is the
7 responses you offer in your rebuttal
8 testimony to Mr. Gertz' testimony about the
9 value of competition amount designated
10 agents. I believe that begins on page 3 of
11 your rebuttal testimony. Is that correct?

12 Now, your notes starting on page
13 4, four areas in which Mr. Gertz said that
14 there might be valuable competition and then
15 you have your responses to those.

16 I wonder if we could take those
17 one at a time.

18 The first was competition in
19 terms of the royalty rate. What's your
20 response to that, Ms. Kessler?

21 A There is no competition on the
22 rate. The rate is set by this Board.

1 Q How about with respect to the
2 terms on which the designated agents might
3 deal with webcasting?

4 A Like the rate, the terms are also
5 set by this Board through this proceeding.
6 So, there is no competition on terms either.

7 Q Now, the second area of potential
8 competition identified by Mr. Gertz was in
9 terms of the different designated agents
10 might interpret the statute differently.
11 Can you comment on whether you think that
12 would be an area of valuable competition
13 between multiple designated agencies?

14 A Yes, I think that the
15 SoundExchange is not in the business of
16 interpreting the statute. That's a question
17 of law for this Board, for the Copyright
18 Office or for the Federal Courts. We don't
19 interpret the statute.

20 Q And what would happen if RLI were
21 a designated agent and started interpreting
22 the statute differently than say others

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1 might?

2 A I think it would lead to
3 confusion in the marketplace, potentially
4 delays in distributions and increased cost.

5 Q Okay. Now, the third area of
6 competition was with respect to distribution
7 policies. Could you comment on that
8 possibility as well?

9 A Yes, I think that with respect to
10 multiple agents having different policies
11 with respect to distribution will lead to
12 great confusion. Again, increased costs,
13 delays in distributions, unfairness in the
14 distributions.

15 If, for example, one designated
16 agent was -- if, for example, there were a
17 group who some members were represented by
18 one agent and other group members by another
19 agent, one designated agent could offer to
20 split the money to the benefit of their
21 members at the expenses of the members
22 represented by the other collective.

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1 Q Now, when you have those kinds of
2 conflicts now among members of the group,
3 how do those get resolved in the
4 SoundExchange?

5 A SoundExchange facilitates the
6 resolution of the conflict by putting the
7 parties in touch with other, brokering those
8 conversations.

9 We don't make a determination
10 about how to pay the artist. We will pay
11 the artist the way that the group comes
12 forward and instructs SoundExchange to pay.
13 In the absence of those instructions, we do
14 pay. For example, on a group, they -- they
15 each get even shares of the distribution.

16 To the extent one band member may
17 feel they are entitled to more, then we
18 broker those conversations and help them to
19 resolve it among themselves.

20 Until that resolution has
21 occurred, we hold the money and we don't
22 distribute the royalties of that group.

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1 Q And what are the institutions
2 within SoundExchange that work to try to
3 resolve these disputes?

4 A We have a distribution policy
5 committee comprised of copyright owners and
6 artists who approve and set the policies for
7 distribution purposes.

8 In addition, we hold round tables
9 with the artist community, artist managers,
10 lawyers and the like to get their advice,
11 input and counsel on what are the standard
12 business practices of how to distribute
13 these royalties.

14 Q Now, would this kind of dispute
15 resolution process work if there were two
16 agents and some of the members of the band
17 were represented by RLI and some were
18 represented by SoundExchange?

19 A In my view, no, it would not
20 work. Again, it -- it could be the case
21 where RLI might offer, you know, the drummer
22 and the base player a greater percentage

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1 than the lead singer and the guitar player
2 and we could end up in a situation where
3 more than 100 percent of the royalties due
4 to that group would be accounted for.

5 Q Well, do you think that's
6 something that SoundExchange and RLI could
7 just get together and work out consensually?

8 A No, I do not. The experience
9 that I've had with RLI in working with them
10 to come up with a simple statement of
11 account proved completely unproductive.
12 They were unwilling to work with us in
13 anyway on that and that was a simple form
14 where the Services would be reporting the
15 royalties owed.

16 So, in my -- in my view given
17 that experience, we would have dozens if not
18 hundreds of occasions where RLI and
19 SoundExchange would disagree on these types
20 of things and they would not get resolved.

21 Q The fourth area of potential
22 competition was on cost. That's discussed

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1 over on page 6 of your testimony. Correct,
2 Ms. Kessler?

3 A Yes.

4 Q Can you tell us -- just summarize
5 what your view is about the value of
6 potential competition on costs between RLI
7 and SoundExchange?

8 A There is no value to compete on
9 cost. What would happen in a multi-agent
10 system is that cost would merely be
11 multiplied, duplicated, triplicated, however
12 many designated agents there might be and I
13 also think that the idea of cost competition
14 is really just an incentive to a free ride
15 where SoundExchange would undertake all the
16 costs of compliance and enforcement in these
17 rate settings proceedings and RLI may choose
18 to sit back and not expend those resources.
19 Allow SoundExchange to incur those
20 tremendous costs and then try to compete
21 with us on a cost basis by undercutting us
22 because they didn't invest in -- in

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1 promoting the best of copyright owners and
2 artists.

3 Q Right. Now, you mentioned that
4 litigation costs would be one area of
5 potential free riding. Are there some
6 others that come to mind?

7 A Compliance and enforcement is
8 another area. SoundExchange undertakes the
9 audits of the Services which often results
10 in additional payments of royalties. Would
11 those royalties then be shared with
12 SoundExchange and RLI. RLI wouldn't have to
13 undertake those costs. They know
14 SoundExchange will do so.

15 Q And how about outreach?

16 A Outreach as well, there would be
17 duplication of cost particularly in
18 marketing to artist and copyright owners to
19 join on of the two collectives, but with
20 respect to reaching out to the lesser known
21 artists, the more obscure artists,
22 SoundExchange is committed to reaching those

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1 artists. They're not owned substantial
2 amounts of money and RLI may choose for
3 their business and profits reasons not to
4 expend those resources to get those
5 royalties to the smaller artists and
6 copyright owners.

7 Q Well, could you explain why it is
8 you don't think that there would be
9 increased efficiency as a result of having
10 competition?

11 A Yes, I think that, you know,
12 efficiencies are reflected in the cost
13 expended and the through put and the
14 efficiency with which the distributions
15 occur.

16 Competition among -- which it's
17 not really competition, but if there were
18 multiple agents in the statutory market,
19 there -- there would be potential
20 differences in information provided by the
21 two collecting societies, confusion in the
22 marketplace, disputes among distribution

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1 policies, delays in distributions. All of
2 the things by which we measure efficiency
3 would -- would come to, you know, if not a
4 halt, they would slow down significantly.
5 We would both be developing systems to
6 conduct the distributions and then the
7 collective pull of copyright owners and
8 artists will be paying for -- for both of
9 those systems, those marketing expenses and
10 the like.

11 MR. SMITH: I have no further
12 questions, Your Honor.

13 MR. TAYLOR: Your Honor, in light
14 of the facts --

15 CHIEF JUDGE SLEDGE: Would you
16 come to the podium, Mr. Taylor?

17 MR. TAYLOR: In light of the fact
18 that, Mr. Smith did not ask Ms. Kessler with
19 respect to the terms and conditions, the
20 fourth section of her testimony and that
21 starts on page 7, I'd like to move to strike
22 that part of her testimony because very much

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1 like Mr. Griffin's issue with respect to
2 portability, the terms and conditions are
3 that she speaks to here in her testimony
4 addresses nothing that any of the Services
5 have put at issue affirmatively in this
6 case.

7 Therefore, what she has here is
8 merely amplifying that which she had on
9 direct and I don't think that's proper
10 rebuttal.

11 CHIEF JUDGE SLEDGE: What does
12 that have to do with -- I'm just trying to
13 put that in the context that you put it.
14 What does any of that have to do with
15 whether that was included in her summary of
16 her testimony or not?

17 MR. TAYLOR: It per se doesn't
18 have much to do with her summary of her
19 testimony to the extent that there was
20 actually no direct reference to this part of
21 her testimony.

22 That did not -- because there was

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1 no reference, there wasn't any reason to
2 strike it. But, because of the regulations
3 as they are in this proceeding, my
4 understanding is -- is that whatever is
5 submitted in the direct testimony that's
6 written in rebuttal testimony will, in fact,
7 come in as direct evidence even though there
8 was no summary here in open court.

9 CHIEF JUDGE SLEDGE: So, your
10 unrelated to what she's just -- unrelated to
11 anything that's happened today, you're
12 making a motion to strike.

13 MR. TAYLOR: Exactly, Your Honor.

14 CHIEF JUDGE SLEDGE: I see. And
15 what part?

16 MR. TAYLOR: It would be section
17 3 that begins on page 7 through 9.

18 CHIEF JUDGE SLEDGE: All right.
19 Ms. Ablin, anything on that motion?

20 MS. ABLIN: Just that I would
21 second the motion.

22 CHIEF JUDGE SLEDGE: Mr. Smith.

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1 MR. SMITH: Your Honor, two
2 responses. First of all, there are three
3 points in section 3. One is that there
4 needs to be greater accountability for late
5 payment. One is that there should be census
6 reporting rather than sampling reporting and
7 the third is that the auditing regulations
8 are ineffective.

9 With respect to the second one,
10 the census versus sampling thing, the
11 testimony is clearly directly rebutting
12 testimony offered by Services. That is, the
13 college broadcasters. The other small
14 webcasters who said that it's burdensome for
15 them to have to ever report what they play
16 on their stations and certainly burdensome
17 to have to do it more than once a quarter or
18 once a year.

19 So, I think Mr. Taylor is
20 incorrect with respect to that section quite
21 clearly.

22 The other two sections are

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1 rebuttal of RLI's evidence, Your Honor.
2 They put in proposed regulations that do not
3 include anything to fix these two problems
4 with the regulations that SoundExchange is
5 saying exists and I think we're entitled to
6 rebut that as well.

7 CHIEF JUDGE SLEDGE: Mr. Taylor.

8 MR. TAYLOR: Two very quick
9 points. I think that Mr. Smith is correct
10 to the extent that he's attributes a
11 complaint by CBI about the terms that were
12 offered by SoundExchange, but I believe that
13 testimony was submitted in the rebuttal
14 phase not in the direct phase. Because
15 obviously, they did not have the benefit of
16 those terms at the time that they submitted
17 their direct statement.

18 I would further add that to the
19 extent that there's a regulation issue here,
20 it has been the ruling as I've understood it
21 from this Court that we would -- that this
22 Court would entertain those issues in the

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1 proper setting of a rule making proceeding
2 which could deal with issues that Mr. Smith
3 things should be taken into account in this
4 proceeding.

5 CHIEF JUDGE SLEDGE: All right.
6 I've heard your point that you agree that
7 RLI presented the terms which are other two
8 points in this session, but you say that was
9 in rebuttal and not in direct.

10 MR. TAYLOR: Yes, Your Honor,
11 that's what I -- as I understand it.

12 CHIEF JUDGE SLEDGE: And what was
13 your other point?

14 MR. TAYLOR: My other point is
15 that to the extent that there's anything
16 under the terms that are not -- that
17 SoundExchange is unhappy with respect to the
18 regulations, that would be better proceeded
19 and better dealt with in the rule making
20 proceeding as Your Honors have limited
21 testimony with respect to record keeping and
22 the regulations governing that.

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1 CHIEF JUDGE SLEDGE: That's not a
2 -- how is that a ground for a motion to
3 strike?

4 MR. TAYLOR: Well, to the extent
5 that it's -- that Your Honors have limited
6 testimony on those points as saying that's
7 not proper for this proceeding, this forum
8 to deal with those issues and that, in fact,
9 you have another venue, the rule making
10 proceeding, where you have notice and
11 comment period for people to participate in.
12 That testimony would be more properly
13 addressed to this Board in the rule making
14 proceeding.

15 JUDGE WISNIEWSKI: You're not
16 suggesting we obstruct any such testimony.

17 MR. TAYLOR: I'm not suggesting
18 that you've necessarily obstructed, but my
19 understanding is that you certainly have
20 encouraged parties to move on with respect
21 to the summary of their information as it
22 being, for lack of better words, irrelevant

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1 to this proceeding today.

2 JUDGE WISNIEWSKI: As I
3 understand your motion, you're asking us to
4 actually strike this?

5 MR. TAYLOR: Oh, yes, I am, but
6 I'm just -- as -- I'm moving to strike on
7 more of the grounds that, in fact, that this
8 does not properly rebut anything that the
9 Services put at issue affirmatively and I
10 also add the mere points that to the extent
11 that Mr. Smith said that there were two
12 terms that weren't properly dealt with in
13 the regulation and that Your Honors should
14 have the benefit of hearing on or at least
15 considering, I would just merely point out
16 that Your Honors have limited testimony with
17 respect to the record keeping and those
18 terms. To whatever extent SoundExchange may
19 be upset, they have recourse in the rule
20 making proceeding to deal with that.

21 CHIEF JUDGE SLEDGE: By your
22 silence then, you concede that on the second

1 point in this section on sampling versus
2 census that that was part of the direct
3 case?

4 MR. TAYLOR: No, it was not. It
5 was not part of the service's direct case.
6 It was part --

7 CHIEF JUDGE SLEDGE: That's not
8 the -- that's not the issue we're to
9 address. You're saying that it's not a part
10 of the direct case in a motion to strike.

11 MR. TAYLOR: I'm saying that it
12 is improper rebuttal testimony.

13 CHIEF JUDGE SLEDGE: You're
14 saying the same thing I'm saying.

15 MR. TAYLOR: Because those are --

16 CHIEF JUDGE SLEDGE: Which
17 doesn't address the issue.

18 MR. TAYLOR: Okay. The -- and
19 those issues were not -- those issues were
20 brought out by SoundExchange not by
21 Services. So, therefore, they're just
22 amplifying those points.

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1 CHIEF JUDGE SLEDGE: No, we're
2 not communicating.

3 MR. TAYLOR: I'm sorry.

4 JUDGE ROBERTS: Mr. Taylor,
5 didn't IBS bring out in its direct case
6 issues about census versus sampling and we
7 had witness testimony that census reporting
8 would be impossible for us and we need to
9 have sampling?

10 MR. TAYLOR: Again, my
11 recollection is that there -- in the actual
12 testimony, it was more on cross and that I
13 don't specifically remember any issue on
14 direct -- of their direct testimony.

15 I do know that they did bring it
16 up in the rebuttal part. I don't have a
17 transcript in front of me. So, I can't
18 appoint Your Honors to what points I
19 believe, but that is as I remember the
20 record.

21 JUDGE ROBERTS: I'm afraid I
22 don't share the same recollection with you.

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1 MR. TAYLOR: I think that's
2 perfectly reasonable. So, to the extent
3 that if -- to the extent that, you know, if
4 Your Honors disagree that there was, in
5 fact, testimony on the second point, then,
6 therefore, it could reasonably be concluded
7 that that is proper rebuttal testimony.

8 But, the other two terms still
9 would not be proper rebuttal.

10 CHIEF JUDGE SLEDGE: Ms. Ablin,
11 anything to add?

12 MS. ABLIN: Your Honor, nothing
13 further on the second point, but I would
14 reiterate as to the first and third points.
15 Absolutely, no services did provide any
16 direct testimony on late payments which is
17 the first point or the audit provisions
18 which is the third point and there's no
19 mention in these paragraphs of any attempt
20 to rebut anything that Royalty Logic had
21 said and as Mr. Taylor said, that testimony
22 had come in on rebuttal. So, as to the

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1 first and third points, there was no direct
2 testimony from this side of the table on
3 that either written or oral.

4 CHIEF JUDGE SLEDGE: Mr.
5 Freundlich.

6 MR. FREUNDLICH: I don't have
7 anything more to add to that.

8 CHIEF JUDGE SLEDGE: Mr. Smith.

9 MR. SMITH: Your Honor, my point
10 with respect to RLI is that they put in a
11 comprehensive set of regulations they asked
12 this Board to adopt in their direct case and
13 it not have a fix for these two problems and
14 so, as a result of that, we are entitled to
15 say you should have fixed those problems in
16 the rebuttal phase. I noticed there was any
17 real response to that point. That is my
18 argument on -- with respect to the first
19 point and the third point.

20 CHIEF JUDGE SLEDGE: As no one
21 and certainly not the Bench has the direct
22 cases here with them, Mr. Taylor, you'll

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1 file that in writing.

2 MR. TAYLOR: Yes, Your Honor.

3 JUDGE WISNIEWSKI: Just one
4 question. Mr. Taylor, when you rise making
5 that motion, who are you rising on behalf of
6 today?

7 MR. TAYLOR: Your Honor, that's a
8 perfectly reasonable question today, but
9 since Mr. Larson is here, I assume that he's
10 representing DiMA and I am wearing my usual
11 hat of National Public Radio.

12 JUDGE WISNIEWSKI: That was my
13 assumption, but I didn't want to presume.

14 CHIEF JUDGE SLEDGE: Which
15 perhaps was your polite way of saying Mr.
16 Larson, I haven't called on you in this
17 discussion.

18 MR. LARSON: Thank you, Your
19 Honor. We concur in what was said by Mr.
20 Taylor.

21 CHIEF JUDGE SLEDGE: All right.
22 Mr. Larson, since you're recently from your

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1 seat, please proceed.

2 CROSS EXAMINATION

3 BY MR. LARSON:

4 Q Good morning, Ms. Kessler.

5 A Good morning.

6 Q I'm Todd Larson. I'm here
7 representing DiMA and AOL and Yahoo. I have
8 just a few short questions for you.

9 You make some comments in the
10 section we were just talking about about the
11 reactions of webcasters to SoundExchange's
12 recent audit request. Do you recall that?

13 A Yes.

14 Q I believe it's page 8 if you want
15 to turn to it.

16 Let me ask this. Were you
17 included in the conversations between the
18 outside auditors hired by SoundExchange and
19 the webcasters being audited?

20 A Was I included in those meetings
21 or those discussions?

22 Q Well, were you included in the

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1 discussions in anyway?

2 A I heard about them after the
3 fact. Yes.

4 Q Okay. So, the basis of your
5 description of the webcasters' reaction is
6 secondhand? Is that fair to say?

7 A As informed by my staff. Yes.

8 Q Okay. Are you aware that certain
9 webcasters have objected --

10 CHIEF JUDGE SLEDGE: By that
11 answer then, the answer is no when you said
12 --

13 THE WITNESS: By my -- my staff
14 informed me.

15 CHIEF JUDGE SLEDGE: She said
16 third hand and his question was secondhand.
17 Is that right?

18 THE WITNESS: My staff would have
19 informed me about those discussions. They
20 would have been part of those discussions.

21 CHIEF JUDGE SLEDGE: They would
22 have been part of the discussions?

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1 THE WITNESS: Yes.

2 CHIEF JUDGE SLEDGE: I'm sorry.

3 I interpreted the question and the answer to
4 be that they were told about the discussions
5 and they told you about the discussions.
6 So, it was secondhand.

7 THE WITNESS: Secondhand. Yes.

8 CHIEF JUDGE SLEDGE: All right.

9 BY MR. LARSON:

10 Q Okay. And are you aware that
11 certain webcasters have objected that the
12 scope of the audit request goes beyond what
13 is required to comply with the audit
14 provisions in the governing statute?

15 A I understand they've taken that
16 position. We disagree.

17 Q Okay. I want to hand an exhibit
18 marked as Services' Rebuttal Exhibit 35.

19 Ms. Kessler, do you recognize
20 this document as a letter, an audit letter,
21 that was sent from Royalty Review Counsel to
22 Yahoo in July of this year?

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1 A Yes.

2 (Whereupon, the document
3 was marked as Services'
4 Rebuttal Exhibit 35 for
5 identification.)

6 BY MR. LARSON:

7 Q Okay. And can you just tell me -
8 - well, let's be clear. This was a letter,
9 is it not, that was sent with a set of
10 preliminary questions that would be answered
11 prior to the auditors coming on site at
12 Yahoo?

13 A I believe so. Yes.

14 Q Okay. And can you just tell us
15 how many questions are included here? Well,
16 strike that. I won't make you sit and count
17 them. Does it appear to you that there are
18 31 preliminary questions that were asked as
19 part of this inquiry?

20 A Approximately. Yes.

21 Q Okay. And when you say in your
22 statement that webcasters have refused to

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1 answer even the most basic questions needed
2 to conduct an audit, are these the questions
3 that you're referring to?

4 A Some of them. Yes.

5 Q Okay.

6 CHIEF JUDGE SLEDGE: Mr. Larson,
7 I'm a little puzzled by this exhibit.

8 MR. LARSON: Um-hum.

9 CHIEF JUDGE SLEDGE: Does Royalty
10 Review Counsel refer to an auditor?

11 THE WITNESS: Yes.

12 MR. LARSON: And this is an
13 auditor hired by SoundExchange to conduct an
14 audit of Yahoo. Correct.

15 THE WITNESS: That's correct.

16 CHIEF JUDGE SLEDGE: What a
17 presumptuous name. Auditor calls itself
18 Royalty Review Counsel.

19 THE WITNESS: We didn't select
20 our auditors based on --

21 MR. LARSON: Your Honor, I would
22 offer Services' Exhibit 35 into evidence at

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1 this point.

2 CHIEF JUDGE SLEDGE: Any
3 objection to this exhibit?

4 MR. SMITH: No, Your Honor.

5 CHIEF JUDGE SLEDGE: All right.

6 MS. LARSON: I have no further
7 questions.

8 CHIEF JUDGE SLEDGE: Without
9 objection the exhibit's admitted.

10 (Whereupon, the document
11 marked as Services'
12 Rebuttal Exhibit 35 was
13 received in evidence.)

14 CHIEF JUDGE SLEDGE: Ms. Ablin.

15 CROSS EXAMINATION

16 BY MS. ABLIN:

17 Q Good morning, Ms. Kessler.

18 A Good morning.

19 Q I'd like to start by asking you a
20 question or two about your statements on the
21 number of services streaming. Do you recall
22 providing that testimony a few minutes ago?

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1 A Yes, I do.

2 Q And I'm going to hand out a
3 document that's been marked as Services'
4 Rebuttal Exhibit 36 and this document has
5 been Bates numbered for the record as SX-
6 REB10292.

7 JUDGE ROBERTS: I got to tell,
8 Ms. Ablin, you all are killing me with these
9 little numbers here.

10 MS. ABLIN: I apologize, Your
11 Honor. This is how the document, in fact,
12 was produced to us in discovery.

13 JUDGE ROBERTS: Fair enough.
14 They just seem to get smaller with each day
15 of testimony.

16 THE WITNESS: And, Your Honor, I
17 -- I can't read this. I can't see it.

18 MS. ABLIN: I don't know that I
19 got through the Bates numbers. Just for the
20 record, it's been marked as -- hopefully,
21 the Bates number at least is readable. It's
22 SX-REB10292-324 and I will represent as I

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1 said a minute ago that the document was, in
2 fact, produced in discovery by SoundExchange
3 to us in this form.

4 (Whereupon, the document
5 was marked as Services'
6 Rebuttal Exhibit 36 for
7 identification.)

8 BY MS. ABLIN:

9 Q And could you please identify
10 this document?

11 A It's a receipt log payment report
12 for a certain time period that I can't quite
13 make out. It looks like through 2006 I
14 think.

15 Q And I take it, Ms. Kessler, that
16 this document was generated by
17 SoundExchange's systems.

18 A Yes, it likely was. Um-hum.

19 Q And it reflects payments made by
20 webcasters for the years as you just noted
21 1998 through 2006?

22 CHIEF JUDGE SLEDGE: She did not

1 note it. She said she couldn't read it.

2 MS. ABLIN: Okay.

3 BY MS. ABLIN:

4 Q Well, Ms. Kessler, can you at
5 least read the 1998 year?

6 A I'll have to take your word for
7 it. I honestly can't see the beginning
8 year, but I do believe the final year is
9 2006.

10 Q Okay. Well, perhaps we can just
11 so we're clear on it count backwards from
12 the years and again, this is how the
13 document was given to us. So, we've got to
14 work with what we've got.

15 You see a number of columns on
16 the first page for each of the years?

17 A Yes.

18 Q And how many columns are there
19 there?

20 A Oh, I see what you're saying.
21 Yes, of course, that's -- yes, I agree with
22 you.

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1 Q So, you agree that this starts in
2 1998?

3 A Yes.

4 Q And given that this document was
5 produced to us by your company SoundExchange
6 in discovery and was generated by your
7 systems, do you believe that the information
8 in this document is generally accurate?

9 A Yes, I do.

10 MS. ABLIN: Your Honor, I would
11 move to admit Services' Rebuttal Exhibit 36.

12 JUDGE ROBERTS: Just that one
13 point of clarification, Ms. Ablin. I see it
14 as being 1998 through 2005. I believe you
15 had said 2006.

16 MS. ABLIN: Your Honor, I believe
17 that the last column of data in this
18 document reflects the partial year data for
19 2006 because, in fact, we are not through
20 with the year, but Ms. Kessler's free to
21 correct me on that.

22 JUDGE ROBERTS: Okay. Because

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1 that's not what the receipt log payment
2 report for -- at the top of the page says.
3 That date's clearly 2005.

4 MS. ABLIN: Yes, I --

5 JUDGE ROBERTS: But, I see that
6 there are at least -- there is some data in
7 the 2006 column for some filers.

8 MS. ABLIN: Yes, Your Honor, I
9 believe that the document probably reflects,
10 and Ms. Kessler obviously is free to correct
11 me if this is wrong, data through -- full
12 data through full year 2005 with partial
13 year data for 2006 which may be why the
14 title of the document goes through 2005.

15 MR. SMITH: Your Honor, I need to
16 move that this be admitted on a restricted
17 basis. It's data that by the regulations is
18 confidential. We can't disclose to the
19 webcasters, for example, what each
20 particular -- I mean to the record
21 companies, for example, what each particular
22 webcaster is paying in. So, it needs to be

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1 kept confidential. I have no objection to
2 its admission, but I do move that it be
3 subject to a protective order.

4 CHIEF JUDGE SLEDGE: Without
5 objection, it's admitted.

6 (Whereupon, the document
7 marked as Services'
8 Rebuttal Exhibit 36 was
9 received in evidence.)

10 CHIEF JUDGE SLEDGE: Now, your
11 move to apply the protective order because
12 you can't disclose, how does that affect
13 whether it is part of the public record if
14 you don't disclose it?

15 MR. SMITH: The regulations
16 provide that this is information that ought
17 to be kept confidential from the recipients
18 of the royalties and so --

19 CHIEF JUDGE SLEDGE: By
20 SoundExchange?

21 MR. SMITH: Yes, we're the only
22 ones that have the information until it gets

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1 put on --

2 CHIEF JUDGE SLEDGE: Well, how
3 does that affect whether the protective
4 order ought to apply in a public
5 proceedings?

6 MR. SMITH: Your Honor, we
7 wouldn't have given it to the opposing
8 parties because of our obligation unless it
9 was subject to restriction and I think given
10 what the regulations provide as a policy, it
11 would seem to be the kind of thing that you
12 would want to keep the record companies from
13 having access to because there's a policy of
14 the regulations that they shouldn't have
15 this information.

16 CHIEF JUDGE SLEDGE: No, your
17 describing the policy that governs the
18 activity of SoundExchange.

19 MR. SMITH: I'm just trying to
20 comply with our obligations, Your Honor. If
21 you think that this is not something that --
22 that that regulation should only apply to

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1 our voluntary conduct and then this
2 situation wouldn't apply, then that would be
3 the ruling.

4 I certainly felt obligated to
5 raise the issue.

6 CHIEF JUDGE SLEDGE: We need to
7 recess. All right. We'll take a short
8 recess.

9 MS. ABLIN: Your Honor, if I may
10 before you recess --

11 CHIEF JUDGE SLEDGE: Yes.

12 MS. ABLIN: -- this may inform --
13 I would actually join Mr. Smith's motion
14 that this document be protected because the
15 data is, in fact, confidential data that is
16 protected under the regulations by the
17 Services and it includes confidential data
18 from some of our clients, the radio
19 broadcasters through 2006.

20 CHIEF JUDGE SLEDGE: Thank you
21 for forewarning us, but that's not what
22 we're immediately debating although you may

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1 file a motion if it's denied.

2 (Whereupon, at 10:11 a.m. off the
3 record until 10:14 a.m.)

4 CHIEF JUDGE SLEDGE: After
5 deliberation, the motion by SoundExchange to
6 apply the protection order is denied.

7 MR. SMITH: It's denied.

8 CHIEF JUDGE SLEDGE: Denied.

9 MR. SMITH: Thank you, Your
10 Honor.

11 MS. ABLIN: Your Honor, in that
12 case, I would then formally move on behalf
13 Radio Broadcasters that this document be
14 admitted as restricted under the protective
15 order. As I mentioned earlier, the document
16 contains payment information year by year,
17 receipts data for a number of our clients
18 including Bonneville, Clear Channel and
19 Susquehanna and that data is specifically
20 recognized under the CRV's -- the rates and
21 terms that have been in place as
22 confidential information. It's directly

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1 related to the performances, the number of
2 performances, the levels of listenership
3 that those streaming services experience
4 over the course of these years and that's
5 commercially sensitive, competitively
6 sensitive information that we would move to
7 protect under the protective order.

8 CHIEF JUDGE SLEDGE: Any
9 objection to the motion by SoundExchange to
10 apply the protective order? Thank you. By
11 Radio Broadcasters. No objection. The
12 majority of the Court grants the motion.

13 BY MS. ABLIN:

14 Q Now, Ms. Kessler, if you could
15 turn to the exhibit attached to your
16 rebuttal statement which is SoundExchange
17 Exhibit 22RR.

18 A Yes.

19 Q And if I could direct your
20 attention to the second page of that exhibit
21 and footnote 1.

22 A I'm sorry. What was that?

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1 Q Footnote 1.

2 A Yes.

3 Q And in footnote 1, you state that
4 the number of simulcasters that paid
5 royalties in a give year does not include
6 the individual stations operated by certain
7 radio broadcasters and then you name those
8 radio broadcasters in the footnote. Is that
9 correct?

10 A That's correct.

11 Q So, I take it that there are a
12 number of other radio broadcasters for which
13 SoundExchange does count each individual
14 radio station that is streaming when it
15 comes up with its counts of the Services.
16 Is that correct?

17 A That's correct.

18 Q And, for example, if I could
19 direct your attention back to Services'
20 Rebuttal Exhibit 36 and if you could turn --
21 actually, if you could look at the first
22 page. Hopefully, this much is readable on

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1 it. Do you see at a bottom a number of
2 listings for Bonneville International? A
3 number of line-item entries?

4 A Yes, I do.

5 Q And if you could flip the page
6 over to Bates number 10293. You see that
7 those continue on.

8 A Yes, they do.

9 Q And some of those entries for
10 Bonneville are identified as simulcast in
11 column 1. Is that correct?

12 A That's correct.

13 Q And then other entries for
14 Bonneville are not identified as simulcast.
15 Is that correct?

16 A That's correct.

17 Q And I take that SoundExchange
18 counts each of the simulcasting stations and
19 each of the other channels again just
20 focusing on Bonneville for the moment
21 separately when calculating the number of
22 Services webcasting or simulcasting in a

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1 particular year. Is that correct?

2 A To the extent a broadcast group
3 breaks out the individual stations for whom
4 they are paying, we will count each of those
5 stations individually, but recognize that
6 there's a parent company to that station.

7 To the extent a broadcast group
8 does not break out their individual radio
9 stations, we would simply count the parent
10 company as a single service.

11 The same thing happens with our
12 aggregator such as Live365.

13 Q So, in the instance of Bonneville
14 here, SoundExchange would have counted each
15 of the separate line items as separate
16 services. Is that correct?

17 A It appears that's the case. Yes.

18 Q And if you could turn the page to
19 SX REB10293.

20 A That's the second page of this
21 document?

22 Q The second page of this document.

1 Yes. And do you see a number of entries in
2 the middle of the page for Broadcast
3 Electronics, Inc.?

4 A I do.

5 Q And then a number of other
6 entries below that for CBS Radio, Inc.?

7 A I do.

8 Q And if you could flip over to the
9 next page 294, you see there that the CBS
10 Radio, Inc. entries continue on.

11 A That's correct.

12 Q And then do you see a number of
13 other entries at the bottom of the page for
14 Crawford Broadcasting Company?

15 A Yes, that's below the single
16 entry for Clear Channel. Um-hum.

17 Q Yes and in each of these cases
18 for Broadcast Electronics, CBS Radio and
19 Crawford Broadcasting, I take it that each
20 of these broadcaster groups were also
21 counted as separate services for each line
22 item in this spreadsheet.

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1 A That's correct.

2 Q And if you could flip over to
3 page SX-REB10295.

4 A Yes.

5 Q And I'll just direct your
6 attention to the following two pages as
7 well, 296 and 297.

8 A Yes.

9 Q And you see on these three pages
10 many entries for the Broadcaster Intercom
11 Communications Corp.

12 A That's correct.

13 Q And again, SoundExchange counts
14 each station listed here as a separate
15 service for Intercom.

16 A That's correct. That's correct.

17 Q And we won't go through all of
18 these, but just a couple of -- a couple of
19 other ones. If you could flip to 10298.

20 A Yes.

21 Q And do you see a number of
22 entries for Greater Media, Inc. near the top

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1 of the page?

2 A I do.

3 Q And as well if you could flip to
4 10299.

5 A Yes.

6 Q And continuing on to the
7 following page 10300 and 301.

8 A Yes.

9 Q Do you see a number of entries on
10 those three pages for Regent Broadcasting
11 Management LLC?

12 A I do.

13 Q And I take it that SoundExchange
14 counts as separate services each line item
15 for the Broadcasters Greater Media, Inc. and
16 Regent Broadcasting Management LLC. Is that
17 correct?

18 A I believe so. Yes.

19 Q And then just the last one. If
20 you could look at page 10301.

21 A Um-hum.

22 Q And do you see --

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1 A Yes.

2 Q -- you see a number of entries
3 for Susquehanna Radio Corp. in the middle of
4 the page.

5 A I do.

6 Q And so, SoundExchange counts each
7 of these entries as a separate service where
8 the parent company listed is Susquehanna
9 Radio Corp. Is that correct?

10 A That's correct.

11 Q Okay. Okay. I'd like to now
12 take a look for a minute at your claim on
13 page 7 of your written rebuttal statement.
14 If you could turn to that page please.

15 JUDGE ROBERTS: Ms. Ablin, before
16 we move onto that, you started this line of
17 questioning by referencing footnote 1. Is
18 there something inaccurate about footnote 1?

19 MS. ABLIN: No, Your Honor, I was
20 simply pointing out that -- while some
21 broadcasters identified in this footnote are
22 counted as a single entity, there are other

1 broadcasters that are counted as multiple
2 services.

3 JUDGE ROBERTS: Oh, all right.

4 MS. ABLIN: That's all.

5 BY MS. ABLIN:

6 Q Are you at page 7?

7 A I am.

8 Q Give me a moment to prepare
9 myself. Now, you assert on that page that
10 the current late-fee provisions simply have
11 not been effective in promoting prompt
12 payments. Is that correct?

13 A That's correct.

14 Q I'm now handing out a document
15 that has been marked as Services' Rebuttal
16 Exhibit 37 and for the record, this document
17 has been Bates numbered SX-REB10705-26.

18 (Whereupon, the document
19 was marked as Services'
20 Rebuttal Exhibit 37 for
21 identification.)

22 BY MS. ABLIN:

1 Q And I will represent that this is
2 a document that was also produced to us by
3 SoundExchange in discovery in connection
4 with your testimony, Ms. Kessler.

5 A Yes.

6 Q Could you please describe this
7 document for us?

8 A It's an Analysis of the Top Ten
9 Webcasters with respect to the receipt date
10 of their payments.

11 Q And it's true, is it not, that
12 the payments made by the webcasters
13 identified in this document which you
14 identified as being the top ten webcasters
15 constitute the vast majority of all payments
16 made by all webcasters?

17 A A substantial amount. Yes.

18 Q And, in fact, it's a substantial
19 majority of the payments that SoundExchange
20 receives?

21 A It is.

22 Q Now, looking at the column labels

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1 at the top of the first page, we will start
 2 there. The column labeled or I should say
 3 the dates rather listed in the column
 4 labeled period, the second column listed
 5 there, I take it that this column represents
 6 the last date of the payment month
 7 pertaining to a given row?

8 A I'm not sure.

9 Q Have you ever seen this document
 10 before?

11 A I likely have. Yes.

12 Q And you see the word period at
 13 the top?

14 A I do.

15 Q Do you see the word received date
 16 next to that?

17 A I believe that the period refers
 18 to the period that the payment applies to
 19 compared to the receipt date which is when
 20 we actually received the payment.

21 Q Okay. Okay. So, in other words
 22 just so we're clear on what this is just

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1 looking at the first line item, for example,
2 the received date of July 7th, 2004 would be
3 a payment that SoundExchange received for
4 AOL.com that would cover the month of April
5 2004?

6 A I believe so. Yes.

7 Q Okay. And if you would look at
8 the last column on this document labeled
9 difference.

10 A Yes.

11 Q I take it that the numbers in
12 this column are the number of days
13 difference between the last date in the
14 period listed in the period column and the
15 received date in the column next to that.

16 A Yes.

17 Q And then I take it that -- do you
18 see the bolded numbers that are not
19 associated with a particular row and it
20 appears that there are three. That the line
21 items are grouped in threes and then there's
22 a bolded number directly below the three

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1 rows.

2 A Yes.

3 Q Do you see what I'm talking
4 about?

5 A I do.

6 Q Now, I take it that that number
7 represents the average of the difference
8 numbers for that quarter, for the three
9 months listed in that quarter?

10 A It appears so. Yes.

11 Q Now, the regulations provide for
12 the Services analyzed in this spreadsheet
13 that payments are due 45 days after the end
14 of the month for which payments are due.
15 Correct?

16 A Correct.

17 Q So, if I wanted to calculate the
18 number of days late that a particular
19 payment was, I would take the number in the
20 column labeled difference and subtract 45.
21 Is that correct?

22 A That's correct.

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1 Q And if I wanted to calculate the
2 average number of days late a service was in
3 a particular quarters, I could simply take
4 the bolded difference -- quarterly
5 difference averages that you identified a
6 few minutes ago and subtract 45 from those?

7 A For the average, yes.

8 Q For the average, yes. Now, if
9 you could please turn to page SX-REB10725
10 which is the second to last page of this
11 exhibit.

12 A Yes.

13 Q Could you please describe what
14 the column labeled quarterly average
15 represents?

16 A No, I can't describe what that
17 means.

18 Q Well, Ms. Kessler, I will
19 represent to you that this file was produced
20 to us in native format and that the formula
21 for calculating the quarterly average was an
22 average across the Services listed here

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1 starting with AOL continuing with Clear
2 Channel.

3 A Oh, all of the Services.

4 Q All of the Services across the
5 spreadsheet. So, in other words, this is
6 one -- this was produced to us as one giant
7 spreadsheet with very long rows and at the
8 end of those very long rows was this
9 quarterly average column where these numbers
10 were the average. The formula to calculate
11 the quarterly average column was the
12 average. Does that sound -- is that
13 consistent with your recollection of this
14 document?

15 A Yes.

16 Q So, if I wanted to calculate the
17 average number of days late that all
18 Services listed in this document were for a
19 given quarter, I could take this quarterly
20 average number which is the average of the
21 difference numbers across the spreadsheet
22 and subtract 45. Is that correct?

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1 A I assume so. I would like to see
2 the formulas and the spreadsheet to be able
3 to say with certainty.

4 Q Okay. Well, I have a calculator
5 with me and I'd be happy to walk us through
6 one of the rows if you'd like to do that to
7 assure yourself in that --

8 A No, thank you.

9 Q So, you'll accept the
10 representation that the quarterly average
11 numbers are the average across the rows for
12 all of the Services?

13 A Let me flip through this for a
14 moment --

15 Q Okay.

16 A -- until I get a sense. It
17 appears that's the case. Yes.

18 Q Okay. So, again, if I wanted to
19 calculate the quarterly average dates late
20 that all Services in a given quarter were in
21 making payments, I could take the quarterly
22 average numbers in this column and simply

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1 subtract 45.

2 A Yes.

3 Q Is that correct? Okay. I'm now
4 handing out a document that's been marked --

5 JUDGE ROBERTS: Before you do
6 that, Ms. Ablin, I'm looking at the -- back
7 to 10725. That first number 48, if you
8 subtract 45, that's three. Three days late
9 for what quarter?

10 MS. ABLIN: Your Honor, if you
11 will flip to the --

12 JUDGE ROBERTS: Are we able to
13 tell that?

14 MS. ABLIN: Yes, if you flip to
15 the first page of this document, the period
16 -- in other words, this document is just a
17 continuation of very long rows and so, the
18 period for that quarter would be the quarter
19 -- the second quarter of 2004. In other
20 words, April, May and June 2004.

21 JUDGE ROBERTS: All right. Thank
22 you.

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1 CHIEF JUDGE SLEDGE: In that same
2 space on the second page is a different
3 period.

4 MS. ABLIN: Your Honor, that's
5 simply because as this was produced to us in
6 discovery, these -- this would be the bottom
7 of the rows. So, in other words, it takes
8 two pages to print out all of the rows for
9 AOL.

10 CHIEF JUDGE SLEDGE: I thought
11 this was produced to yo in native form?

12 MS. ABLIN: It was, Your Honor,
13 and --

14 CHIEF JUDGE SLEDGE: Well, then
15 it wasn't produced to you in this paper
16 form?

17 MS. ABLIN: It was produced to us
18 in this paper form and because this was, in
19 fact, so difficult to read, we then late
20 sought to receive this document in native
21 form and because it --

22 CHIEF JUDGE SLEDGE: You --

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1 MS. ABLIN: That's correct, Your
2 Honor.

3 JUDGE ROBERTS: So, there's nine
4 quarters here that are being reported?

5 MS. ABLIN: Yes, Your Honor.
6 And, Your Honors, this may help matters a
7 bit. I'm about to hand out another document
8 that's been marked as Services' Rebuttal
9 Exhibit 38 and I will represent that
10 Services' Rebuttal Exhibit 38, in fact, is a
11 printout from the native form document we
12 received. It's a little bit more readable
13 because everything from AOL, for example, is
14 printed out on one page instead of two. So,
15 you can see all of the quarters on a single
16 page and I will further represent that we
17 have added the columns that Ms. Kessler has
18 just described would be an appropriate way
19 of calculating days late at the right-hand
20 side of each of these pages.

21 There is an additional column
22 that did not appear on the hard copy

1 document we received in discovery that lists
2 the days late for each Service for each
3 month.

4 (Whereupon, the document
5 was marked as Services'
6 Rebuttal Exhibit 38 for
7 identification.)

8 BY MS. ABLIN:

9 Q And before we go on, Ms. Kessler,
10 I'd like you to just take a look at the days
11 late column and if you could just verify
12 that the days late column is simply 45 days
13 less than the difference column to the left
14 -- immediately to the left of that --

15 MR. SMITH: Your Honor, I object
16 to --

17 CHIEF JUDGE SLEDGE: Mr. Smith.

18 MR. SMITH: -- cross examining
19 this witness on a document that they've
20 produced and based on the testimony of Ms.
21 Ablin, we're suppose to understand what this
22 document is. How are we to know what kind

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1 of manipulation of data when into the
2 generation of this document? I certainly am
3 not able sitting here to verify anything
4 about it and neither is the witness.

5 CHIEF JUDGE SLEDGE: We'll
6 address that with more specificity. The
7 objection's overruled.

8 THE WITNESS: What's the
9 question?

10 BY MS. ABLIN:

11 Q Yes, I had just asked if you
12 could verify -- well, I would invite you to
13 compare Services Rebuttal Exhibit 37 with
14 Services Rebuttal Exhibit 38 which I have
15 just represented is the identical data that
16 we have received with an added column on the
17 right labeled days late and I'm asking you
18 to compare the two documents and verify
19 that.

20 A For every page?

21 MR. SMITH: How could she
22 possibly do that, Your Honor? That would

1 take two hours.

2 CHIEF JUDGE SLEDGE: Looks like
3 she's invited her to do it.

4 MR. SMITH: Well, I object to
5 asking a witness to do that on the stand,
6 Your Honor. I think it's inappropriate. I
7 mean if anything people sitting here for two
8 hours while she matches up hundreds of
9 numbers.

10 CHIEF JUDGE SLEDGE: Judge often
11 think there's better things that could be
12 done with days, but that's -- that's not the
13 criteria. Overruled.

14 THE WITNESS: So, I'm required to
15 do that, Your Honor?

16 CHIEF JUDGE SLEDGE: Until we
17 adapt rules which will be coming as a result
18 of this line of questioning restricting the
19 questions, yes.

20 JUDGE WISNIEWSKI: What was the
21 question again, Ms. Ablin?

22 MS. ABLIN: I've simply asked her

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1 to verify that the days late column in
2 Services Rebuttal Exhibit 38 is nothing more
3 than the difference column minus 45.

4 THE WITNESS: I thought you asked
5 me to compare the two documents to verify
6 they're identical?

7 BY MS. ABLIN:

8 Q I'm sorry. If you could perform
9 the first verification and then we'll move
10 on to one or two others. I'm -- right now,
11 I'm just asking you to verify -- yes. Yes,
12 that's, in fact, true. You should verify
13 that the two documents are identical and
14 then you should verify that the days late
15 column is the differences column minus 45.

16 A Okay.

17 MR. SMITH: Your Honor, if it
18 would move things along if I could have
19 about five --

20 CHIEF JUDGE SLEDGE: Just a
21 moment. Ms. Ablin, on reflection, given
22 that we've just gone through a lengthy line

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1 of questions involving footnote one that
2 added nothing to the evidence, I'm reversed.
3 That objection is sustained. You don't have
4 to answer that kind of question with such a
5 volume without any indication that this
6 would lead to any useful evidence.

7 MS. ABLIN: Your Honor, if I may
8 respond to that since I did not have an
9 opportunity before.

10 Repeatedly during this cross
11 examination of the Services' witnesses,
12 SoundExchange presented the Services with
13 numerous documents that it had prepared that
14 contained calculations to which
15 SoundExchange's counsel made representations
16 as to the accuracy thereof and those
17 witnesses were asked repeatedly to assert
18 the veracity or the -- to verify that those
19 calculations were right.

20 Moreover, we were given this
21 document in a form that was not very usable
22 in order to calculate the number of days

1 late that a Service was.

2 Ms. Kessler makes a direct
3 representation in her statement that the
4 current regulations have not been effective
5 in promoting prompt payment by the Services.
6 I'm simply trying to show for the one
7 analysis that we did get from SoundExchange
8 of the receipt dates for the Services what
9 that analysis actually reflects as to those
10 top ten webcasters and how late they
11 actually were.

12 In order to figure that out, it's
13 not possible to look at the difference
14 column alone because that does not represent
15 the days late. I'm simply trying to --

16 CHIEF JUDGE SLEDGE: You've
17 already covered that. You've already
18 established that.

19 MS. ABLIN: But, I'm trying to --
20 I'm trying to get to a bottom line number,
21 Your Honor. That -- in order to get to that
22 bottom line number of an average across the

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1 Services, it's necessary to show the number
2 of days late and then calculate an average
3 as to that column.

4 CHIEF JUDGE SLEDGE: You're
5 already established your point in the
6 evidence. Move on to something else.

7 MS. ABLIN: Okay. Well, in that
8 case, I would move to admit Services'
9 Rebuttal Exhibit 37.

10 CHIEF JUDGE SLEDGE: Any
11 objection to Exhibit 37?

12 MR. SMITH: No, Your Honor.

13 CHIEF JUDGE SLEDGE: It's
14 admitted.

15 (Whereupon, the document
16 marked as Services'
17 Rebuttal Exhibit 37 was
18 received in evidence.)

19 BY MS. ABLIN:

20 Q Ms. Kessler, if you could look at
21 page 8 of your testimony.

22 A Yes.

1 Q And you state there that
2 SoundExchange has recently undertaken audits
3 of several of the largest webcasting
4 services including those in this proceeding.
5 Is that correct?

6 A That's correct.

7 Q And some of the Services whom
8 SoundExchange has chosen to audit are radio
9 simulcasters. Is that correct?

10 A That's correct.

11 Q For example, SoundExchange is
12 currently auditing Bonneville. Is that
13 correct?

14 A I believe so. Yes.

15 Q And SoundExchange provided notice
16 of its intent to audit Bonneville on
17 December 23rd, 2005. Is that correct?

18 A I think that's correct. Yes.

19 Q And SoundExchange is also
20 auditing Cox Radio Interactive. Is that
21 correct?

22 A I think so. Yes.

1 Q And SoundExchange also gave
2 notice of it's intent to audit Cox on
3 December 23rd, 2005.

4 A That sounds right. Correct.

5 Q And SoundExchange is also
6 auditing Clear Channel. Is that correct?

7 A That's correct.

8 Q And again, it gave notice of its
9 intent to audit on December 23rd, 2005 for
10 Clear Channel?

11 A That's correct.

12 Q Now, you stated in your rebuttal
13 testimony that without exception
14 SoundExchange has been met with delays,
15 resistance and recalcitrance by webcasters.
16 Is that correct?

17 A That's correct.

18 Q And you further assert that
19 webcasters have delayed the process of
20 commencing field -- let me go back. You
21 further assert that webcasters have refused
22 to answer even the most basic questions

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1 needed to conduct an audit and/or have
2 delayed the process of commencing field work
3 by months. Is that correct?

4 A That's correct.

5 Q So, let's take a look at
6 SoundExchange's audit of Bonneville and I'm
7 about to hand out an exhibit. It's been
8 marked as Services' Rebuttal Exhibit 39.

9 Now, Services' Rebuttal Exhibit
10 39 is a letter from Gary Greenstein of
11 SoundExchange to David Redd of Bonneville
12 seeking Bonneville's consent to a change in
13 auditor from Royalty Review Counsel who we
14 talked about earlier to KPMG.

15 (Whereupon, the document
16 was marked as Services'
17 Rebuttal Exhibit 39 for
18 identification.)

19 BY MS. ABLIN:

20 Q Is that correct?

21 A That's correct.

22 Q And this letter is dated

1 September 20th, 2006?

2 A That's correct.

3 Q And so, the letter was sent about
4 nine months after SoundExchange noticed its
5 audit of Bonneville in December 2005. Is
6 that correct?

7 A That's correct.

8 Q So, at the time that you filed
9 your written rebuttal testimony making the
10 statement that without exception Services
11 had delayed SoundExchange's ability to
12 conduct the audit, SoundExchange had just
13 sent this letter nine days before the due
14 date of your rebuttal testimony seeking a
15 change in auditor to Bonneville. Is that
16 correct?

17 A Of those Services with which we
18 had an active audit, all of them have been
19 recalcitrant and delayed in their
20 cooperation with SoundExchange. We had not
21 commenced this audit yet.

22 MS. ABLIN: Your Honor, I would

1 move to strike that last bit of testimony
2 because my question to Ms. Kessler was
3 pinpointed to this document relating to the
4 audit of Bonneville and not the audit as to
5 other services.

6 CHIEF JUDGE SLEDGE: Mr. Smith.

7 MR. SMITH: She specifically
8 asked her to explain how she could make that
9 statement at the time this was going on and
10 she explained exactly how she could
11 differentiating this situation from the
12 situation she was addressing in her
13 statement. It was directly responsive.

14 CHIEF JUDGE SLEDGE: Overruled.

15 BY MS. ABLIN:

16 Q So, Ms. Kessler as to Bonneville
17 the first contact SoundExchange made with
18 Bonneville was nine days before you
19 submitted your written rebuttal testimony.
20 Correct?

21 A Yes.

22 MS. ABLIN: I would move to admit

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1 Services' Rebuttal Exhibit 39.

2 CHIEF JUDGE SLEDGE: Any
3 objection to Exhibit 39?

4 MR. SMITH: No, Your Honor.

5 CHIEF JUDGE SLEDGE: Without
6 objection, Exhibit 39's admitted.

7 (Whereupon, the document
8 marked as Services'
9 Rebuttal Exhibit 39 was
10 received in evidence.)

11 BY MS. ABLIN:

12 Q I am now handing out a document
13 that's been marked as Services' Rebuttal
14 Exhibit 40 and Ms. Kessler, if you could
15 flip to the second page of this document.

16 So, do you see here that this is
17 David Redd's October 3rd consent to
18 SoundExchange's September 20th, 2006 letter
19 seeking a change in auditor?

20 A Yes.

21 (Whereupon, the document
22 was marked a Services'

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Rebuttal Exhibit 40 for
identification.)

BY MS. ABLIN:

Q And this letter was set to
SoundExchange as of the date October 3rd,
2006. Is that correct?

A That's the date on this document.
I don't have the postmark from the letter.
But --

Q Do you recall receiving a consent
from Bonneville consenting to a change in
auditor?

A I don't recall.

Q Are you the person that -- as the
Chief Operating Officer of SoundExchange,
are you the person that oversees generally
the audits from SoundExchange?

A Gary Greenstein oversees the
audits and he reports developments to me.
So, the particulars of when this letter was
received or if consent was granted, I may
not know as it's happening.

1 Q Okay. Well, let's set this
2 aside. Actually, before I set this aside,
3 just one more question. The October 3rd
4 date on this letter when David Redd of
5 Bonneville signed it, that date is
6 approximately two weeks after September
7 20th. Is that correct?

8 A That's correct.

9 Q Let's take a look briefly at
10 SoundExchange's audit of Cox now.

11 I'm handing out a document that's
12 been marked as Services' Rebuttal Exhibit
13 41. Have you had a chance to look over this
14 Exhibit, Ms. Kessler?

15 A Yes.

16 Q Now, this is a September 20th,
17 2006 letter sent by Gary Greenstein of
18 SoundExchange to Grey Lindahl of Cox Radio.

19 (Whereupon, the document
20 was marked as Services'
21 Rebuttal Exhibit 41 for
22 identification.)

1 BY MS. ABLIN:

2 Q Is that correct?

3 A That's correct.

4 Q And in this letter again,

5 SoundExchange is seeking Cox's consent to a

6 change in auditor. Is that correct?

7 A That's correct.

8 Q And just like SoundExchange's

9 letter to Bonneville, SoundExchange's letter

10 to Cox was sent about nine months after

11 SoundExchange noticed its audit of Cox. Is

12 that correct?

13 A That's correct.

14 MS. ABLIN: Your Honor, I would
15 move to admit Services' Rebuttal Exhibit 41.

16 MR. SMITH: No objection, Your
17 Honor.

18 CHIEF JUDGE SLEDGE: Without
19 objection the exhibit's admitted.

20 (Whereupon, the document

21 marked as Services'

22 Rebuttal Exhibit 41 was

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received in evidence.)

BY MS. ABLIN:

Q Okay. Now, I'd like to look at SoundExchange's audit of Clear Channel and I'm handing out a document that's been marked as Services' Rebuttal Exhibit 42 and for the record, this document is Bates numbered SX-REB10362-65.

(Whereupon, the document was marked as Services' Rebuttal Exhibit 42 for identification.)

BY MS. ABLIN:

Q Now, Ms. Kessler, Services' Rebuttal Exhibit 42 is a letter dated August 14th, 2006 again from Gary Greenstein at SoundExchange to Rick Wolf of Clear Channel again seeking Clear Channel's consent to a change in auditor. Is that correct?

A That's correct.

Q And this letter was sent right around eight months after SoundExchange

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1 noticed its audit of Clear Channel in
2 December of 2005. Correct?

3 A Correct.

4 MS. ABLIN: I'm not handing out a
5 document that's been marked as -- actually,
6 I'm sorry. Your Honor, I would move to
7 admit Services' Rebuttal Exhibit 42.

8 CHIEF JUDGE SLEDGE: Any
9 objection to Exhibit 42?

10 MR. SMITH: No, Your Honor.

11 CHIEF JUDGE SLEDGE: Without
12 objection, it's admitted.

13 (Whereupon, the document
14 marked as Services'
15 Rebuttal Exhibit 42 was
16 received in evidence.)

17 BY MS. ABLIN:

18 Q I'm now handing out a document
19 that's been marked as Services' Rebuttal
20 Exhibit 43 and for the record, this document
21 is Bates numbered SX-REB10370-72 and I will
22 represent that this is a document was

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1 produced to us from SoundExchange's files.

2 Hence the Bates numbers on the document.

3 (Whereupon, the document
4 was marked as Services'
5 Rebuttal Exhibit 43 for
6 identification.)

7 BY MS. ABLIN:

8 Q Have you had a chance to look at
9 the document, Ms. Kessler?

10 A Yes.

11 Q So, Services' Rebuttal Exhibit 43
12 is Clear Channel's consent to
13 SoundExchange's request to change an
14 auditor. Is that correct?

15 A That's correct.

16 Q And Clear Channel provided that
17 consent on August 17th, 2006. Is that
18 correct?

19 A That's correct.

20 Q And so, in other words, three
21 days after it received the request, Clear
22 Channel to the change in auditor requested

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1 by SoundExchange.

2 A Yes.

3 MS. ABLIN: Your Honor, I would
4 move to admit Services' Rebuttal Exhibit 43.

5 CHIEF JUDGE SLEDGE: Any
6 objection?

7 MR. SMITH: No, Your Honor.

8 CHIEF JUDGE SLEDGE: Without
9 objection Exhibit 43 is admitted.

10 (Whereupon, the document
11 marked as Services'
12 Rebuttal Exhibit 43 was
13 received in evidence.)

14 BY MS. ABLIN:

15 Q I am now passing out a document
16 that's been marked as Services' Rebuttal
17 Exhibit 44. Have you had a chance to review
18 this exhibit, Ms. Kessler?

19 A Yes, I have.

20 Q Now, this is a letter from
21 SoundExchange's new auditor KPMG to Rick
22 Wolf of Clear Channel.

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1 (Whereupon, the document
2 was marked as Services'
3 Rebuttal Exhibit 44 for
4 identification.)

5 BY MS. ABLIN:

6 Q Is that correct?

7 A That's correct.

8 Q And the letter is dated September
9 8th, 2006.

10 A That's correct.

11 Q And the letter asks Clear Channel
12 to respond to a number of questions in
13 connection with the audit. Is that correct?

14 A That's correct.

15 Q And there are a total of 40
16 questions listed in this document. Is that
17 correct?

18 A That's correct.

19 Q And so, when you were drafting
20 your written rebuttal testimony and
21 submitting it near the end of September,
22 Clear Channel had already consented to

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1 SoundExchange's request for change an
2 auditor within three days of getting that
3 request and had just received earlier in
4 that month an extensive questionnaire from
5 SoundExchange's new auditor. Is that
6 correct?

7 A That's correct.

8 MS. ABLIN: Your Honor, I would
9 move to admit Services' Rebuttal Exhibit 44.

10 CHIEF JUDGE SLEDGE: Any
11 objection to Exhibit 44?

12 MR. SMITH: No, Your Honor.

13 CHIEF JUDGE SLEDGE: It's
14 admitted.

15 (Whereupon, the document
16 marked as Services'
17 Rebuttal Exhibit 44 was
18 received in evidence.)

19 MS. ABLIN: Your Honor, I have
20 one more area of examination, but it's quite
21 lengthy and unless -- this might be an
22 appropriate time to take a break.

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1 CHIEF JUDGE SLEDGE: We'll recess
2 ten minutes.

3 (Whereupon, at 10:58 a.m. off the
4 record until 11:12 a.m.)

5 CHIEF JUDGE SLEDGE: Thank you.
6 We'll come to order.

7 BY MS. ABLIN:

8 Q Ms. Kessler, I'd like to ask you
9 about just one more statement which you make
10 in your written rebuttal testimony. So, if
11 I could direct your attention to page 8
12 please.

13 A Yes.

14 Q And do you see the last sentence
15 on that page where you claim that prior
16 audits with respect to other licensees have
17 shown very significant underpayments. Do
18 you see that statement?

19 A Yes.

20 Q Now, I take it that you were not
21 referring when you made that statement to
22 any of the eligible non-subscription

1 services or new subscription services that
2 are subject to this proceeding. Is that
3 correct?

4 A I was referring to the
5 preexisting services and the second part of
6 that sentence was based on some information
7 we had received on one of the webcasters.

8 Q But, I was asking you about the
9 prior audits statement that you made and the
10 prior audits that SoundExchange has
11 conducted were of preexisting subscription
12 services. Correct?

13 A That's correct.

14 Q They were not of eligible non-
15 subscription services or new subscription
16 services.

17 A That's correct.

18 Q Okay. And you were referring to
19 specifically Muzak and Music Choice.
20 Correct? Audits that SoundExchange
21 conducted of Muzak and Music Choice?

22 A That's correct.

1 Q And according to the applicable
2 preexisting subscription service
3 regulations, Muzak and Music Choice are
4 required to pay royalties to SoundExchange
5 based on a percentage of the gross revenues
6 that they receive. Is that correct?

7 A That's correct.

8 Q So, let's focus first on
9 SoundExchange's audit of Muzak. It's true,
10 it is not, that SoundExchange conducted an
11 audit of Muzak for the years 2001 through
12 2003?

13 A I believe that's correct. I
14 don't recall --

15 Q Okay. Well, I will hand out an
16 exhibit that will refresh your recollection.

17 A Thank you.

18 Q I'm handing out a document that's
19 been marked as Service's Rebuttal Exhibit
20 45.

21 A Thank you.

22 Q And for the record, this document

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1 is Bates number SX-REB12336-72 and I will
2 represent to you that this is a document
3 that was produced to us in discovery by
4 SoundExchange.

5 A Thank you.

6 (Whereupon, the document
7 was marked as Services'
8 Rebuttal Exhibit 45 for
9 identification.)

10 BY MS. ABLIN:

11 Q Now, Ms. Kessler, if you could
12 turn to SX-REB12338.

13 A Yes.

14 Q Now, I'll give you a moment to
15 look over that letter.

16 A Yes.

17 Q And you'll see in this letter
18 that the audit that SoundExchange conducted
19 of Muzak was for the years 2001 through
20 2003.

21 A That's correct.

22 Q And SoundExchange's auditor

1 issued its report on Muzak on November 15th,
2 2005. Is that correct?

3 A That's correct.

4 Q Now, if you could please turn to
5 page SX-REB12345. That's a nice page number
6 and just -- I'll give you a moment to look
7 over this page.

8 A Yes.

9 Q Just as a preliminary matter,
10 this page reflects that the total monies
11 paid by Muzak to SoundExchange --

12 MR. SMITH: Objection, Your
13 Honor. Before we start giving figures out
14 on this, SoundExchange is once again
15 obligated to seek to keep this information
16 confidential under regulations and so, for
17 that same reason, although I think our
18 position in the case is that it should be
19 public, I would make the motion that this
20 information be admitted subject to the
21 protective order.

22 CHIEF JUDGE SLEDGE: The motion

1 to apply the protective order is denied.

2 THE WITNESS: I'm sorry. What's
3 the question?

4 BY MS. ABLIN:

5 Q Sure. Yes. Ms. Kessler, this
6 page reflects that the total monies paid by
7 Muzak to SoundExchange during the audit
8 period of 2001 through 2003 are 1.896353
9 million.

10 A That's correct.

11 Q And if you could please turn now
12 to page SX-REB12339.

13 A Yes.

14 Q Now, this audit report claims
15 that Muzak owed SoundExchange an additional
16 \$847,773. Is that correct?

17 A That's correct.

18 Q Now, let's take a look at some of
19 SoundExchange's audit claims in here. If
20 you could turn to page SX-REB12341.

21 A Yes.

22 Q And I'll give you a moment to

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1 review this page.

2 A Yes.

3 Q Now, SoundExchange's auditor
4 claims that Muzak owed it \$164,914 for what
5 it called incorrect subscriber rate
6 computations. Is that correct?

7 A That's correct.

8 Q And this claim is based on the
9 notion that Muzak should have received but
10 did not more revenues for certain
11 subscribers than it actually did and that
12 SoundExchange, therefore, was entitled to
13 royalties on those revenues that Muzak never
14 actually received. Is that correct?

15 A Yes, it's the differential
16 between the 15 cents and the 3 cents that
17 were charged for certain content. Yes.

18 Q And again, that was money that
19 Muzak never received from its partner
20 EchoStar.

21 A They never collected it.

22 Q They never collected. They never

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1 received it and if you could turn to page
2 SX-REB12342 and if you could take a look at
3 this page.

4 A Yes.

5 Q And on this page, SoundExchange's
6 auditor was claiming that Muzak owed it
7 \$207,657 for what it called under reported
8 satellite subscribers. Is that correct?

9 A That's correct. That's correct.

10 Q And this claim is -- again is
11 based on essentially a guess by
12 SoundExchange's auditor that the number of
13 subscribers with packages including channels
14 programmed by music had been under reported
15 to Muzak by EchoStar?

16 A This situation was identified by
17 our auditor and based on some rough
18 calculations came up with this amount
19 because this is money otherwise due to Muzak
20 which then we would receive a percentage of
21 revenue on.

22 So, by -- by Muzak not receiving

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1 this money, out copyright owners and artists
2 were harmed roughly to the amount of
3 \$200,000.

4 CHIEF JUDGE SLEDGE: Is that
5 EchoStar or EcoStar?

6 MS. ABLIN: EchoStar E-C-H-O.

7 BY MS. ABLIN:

8 Q But, again, SoundExchange's
9 auditor was making a guess as to the number
10 of subscribers that had been under reported.
11 Isn't that true?

12 A No, our auditor made a
13 calculation to estimate the underpayment of
14 royalties -- I'm sorry, the underpayment to
15 Muzak that otherwise would have been subject
16 to the 7 and a quarter or whatever the rate
17 was at the time. The amount of monies that
18 would have been owed to SoundExchange which
19 harmed our copyright owners and artists by
20 an underpayment of roughly \$200,000.

21 Q Okay. Let's take a look at the
22 first paragraph then of this page. It says

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1 here that the auditors researched the SEC
2 filings by EchoStar in order to determine
3 whether the subscriber numbers reported by
4 EchoStar to shareholders were consistent
5 with the information submitted to Muzak and
6 then it says based on our analysis, it
7 appears that the numbers reported to
8 shareholders exceed the subscriber numbers
9 reported by EchoStar to Muzak by a
10 significant amount. Are you with me so far?

11 A That's what it says.

12 Q Okay. Then in the next
13 paragraph, it says in general, EchoStar
14 offers three types of satellite packages to
15 residential subscribers and that one of
16 those packages, the base package, does not
17 include any music programming. Is that
18 correct?

19 A That's what it says.

20 Q And then there's the sentence
21 that says it does not appear to be
22 reasonable that one-third of the customers

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1 for EchoStar would be purchasing the base
2 package.

3 A And it goes on to ask Muzak to
4 respond to the question. Yes.

5 Q Okay. Well, we'll get to Muzak's
6 response in a moment. This claim though
7 again is based on revenue that Muzak never
8 actually received. SoundExchange was
9 asserting a right to collect royalties on
10 revenue that had been unpaid to Muzak for
11 these allegedly under reported subscribers.
12 Is that correct?

13 A SoundExchange's position is that
14 royalties due -- I'm sorry, payments due to
15 Muzak are subject to the statutory
16 percentage of revenue and by virtue of Muzak
17 not collecting these monies, we were
18 directly harm by them. Yes.

19 Q So, my question was simply this
20 claim is based --

21 CHIEF JUDGE SLEDGE: Which she
22 answered, Ms. --

1 MS. ABLIN: Okay. She did.

2 Okay.

3 CHIEF JUDGE SLEDGE: Yes.

4 MS. ABLIN: Okay.

5 BY MS. ABLIN:

6 Q The revenues were unpaid to
7 Muzak. Correct?

8 CHIEF JUDGE SLEDGE: She said
9 yes.

10 MS. ABLIN: Okay. Okay.

11 BY MS. ABLIN:

12 Q Now, Muzak, in fact, informed
13 SoundExchange that it had checked with
14 EchoStar and received assurances that the
15 subscriber counts were, in fact, accurate.
16 Isn't that true?

17 A I'm sorry. Where is that?

18 Q I'm just asking you a question.
19 I said Muzak, in fact, informed
20 SoundExchange that it had checked with
21 EchoStar and it had received assurances that
22 the subscriber counts were accurate.

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1 A I don't know.

2 Q Okay. I'm handing out a document
3 that's been marked as Services' Rebuttal
4 Exhibit 46. For the record, I'll note that
5 this document is Bates numbered SX-REB12377-
6 79 and was produced to us by SoundExchange
7 in discovery.

8 Now, Ms. Kessler, this is a
9 letter that's dated January 18th, 2006 and
10 it was sent by Michael Zendan of Muzak to
11 Gary Greenstein at SoundExchange.

12 (Whereupon, the document
13 was marked as Services'
14 Rebuttal Exhibit 46 for
15 information.)

16 BY MS. ABLIN:

17 Q Is that correct?

18 A That's correct.

19 Q And the letter responds to the
20 audit claims that SoundExchange has made.
21 Is that true?

22 A That's correct.

1 Q And if I could direct your
2 attention to the last page of this document,
3 SX-REB12379. Actually, I'm sorry 12378.

4 A Yes.

5 Q And if you could take a look at
6 paragraph 2 entitled Under Reported
7 Satellite Subscribers which we were just
8 looking at in the Muzak audit report.

9 A Yes.

10 Q And do you see the second
11 sentence of this letter that reads Muzak LLC
12 has received assurances from EchoStar that
13 all subscriber counts for the audit period
14 in question were and continue to be
15 accurate?

16 A I do.

17 Q And do you see at the bottom of
18 that -- of section 2 that, I'm sorry, that
19 Muzak also says that EchoStar has reviewed
20 its subscriber counts in connection with the
21 claims made in the audit report and has
22 represented to us that the subscriber counts

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1 reported to Muzak for the audit period in
2 question were and continue to be accurate
3 and complete?

4 A That is what EchoStar has said to
5 me. Yes.

6 MS. ABLIN: Your Honor, I would
7 move to admit Services' Rebuttal Exhibit 46.

8 CHIEF JUDGE SLEDGE: Any
9 objection to Exhibit 46?

10 MR. SMITH: If I could just have
11 a moment, Your Honor. Your Honor, without
12 having asked the witness whether she's ever
13 seen this document before or whether it's an
14 authentic document, I think we shouldn't be
15 putting it into evidence at this point. I
16 would object.

17 CHIEF JUDGE SLEDGE: Ms. Ablin.

18 MS. ABLIN: Your Honor, Ms.
19 Kessler is SoundExchange's Chief Operating
20 Officer and she's the witness that
21 SoundExchange has presented to make claims
22 on -- specifically on the audit that

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1 SoundExchange performed of Muzak. This is a
2 document that was produced to us from
3 SoundExchange's files and we believe that
4 it's entirely appropriate to admit the
5 document.

6 CHIEF JUDGE SLEDGE: Objection
7 overruled. It's admitted.

8 (Whereupon, the document
9 marked as Services'
10 Rebuttal Exhibit 46 was
11 received in evidence.)

12 MR. TAYLOR: Your Honor.

13 CHIEF JUDGE SLEDGE: Yes, sir.

14 MR. TAYLOR: It may seem a little
15 precarious my position here, but the fact of
16 the matter is I would move that this is
17 admitted into evidence as you have ruled.
18 But, admitted under the protective order.

19 I'm concerned about the fact that
20 this whole audit discussion is something
21 that is not of public nature. Is not in the
22 public domain and the public is not aware of

1 it. The truth and veracity of the
2 individuals dispute is -- has not been
3 determined and I think the consequences of
4 the Board permitting this information on the
5 public record without any safeguards there
6 may be extremely harmful to Muzak who is not
7 here and not represented by anybody and to
8 the extent that I'm able to encourage the
9 Board to reconsider its ruling on putting
10 this on the protective record, I do so at
11 this time.

12 CHIEF JUDGE SLEDGE: Reconsider
13 what ruling?

14 MR. TAYLOR: My understanding was
15 that Mr. Smith had asked that we -- that the
16 document and discussion of the document not
17 be under the protective order and my
18 understanding is that you denied that
19 request.

20 CHIEF JUDGE SLEDGE: This
21 document.

22 MR. SMITH: I made a motion with

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1 respect to 45 which is the other ruling.

2 MR. TAYLOR: That's what I
3 thought and so we're discussing this motion,
4 but -- this document, but to the extent that
5 -- and that is what my motion goes to
6 directly.

7 But, I also rise just for the
8 purpose of discussing Muzak and the claims
9 that are being discussed here on the public
10 record and note that the truth of it or
11 whatever it may be is not public knowledge.
12 We're talking about a public company and the
13 consequences of this dispute between
14 SoundExchange and Muzak could be detrimental
15 for the company to the extent that this kind
16 of information that has not been verified or
17 validated by anybody is discussed openly and
18 freely.

19 And so, on behalf of Muzak to the
20 extent that I can represent them, they are a
21 client of the firm and I would just ask the
22 Board to reconsider its ruling -- its

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1 previous ruling. At the same time, I
2 request that as you admit this document into
3 evidence that you do so under the protective
4 order.

5 CHIEF JUDGE SLEDGE: You're
6 moving this as a representative of Muzak?

7 MR. TAYLOR: To the extent that
8 I'm able to in this proceeding, Your Honor,
9 I feel compelled to say, you know, to speak
10 out for Muzak and to say that quite frankly
11 this discussion could be harmful or
12 detrimental to the company.

13 JUDGE ROBERTS: But, you have no
14 idea of that?

15 MR. TAYLOR: I can't predict the
16 consequences, but I can say that it
17 certainly is possible that this discussion
18 which has been made on the record here could
19 have, you know, detrimental consequences for
20 a company that is not represented in this
21 proceeding and had no notice of these
22 documents coming in and of a dispute. That

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1 we don't know that, you know, who -- he
2 said/she said and the purpose of this
3 proceeding isn't even to decide he said/she
4 said and so, with that --

5 CHIEF JUDGE SLEDGE: Am I correct
6 in interpreting your remarks that you have
7 no authority on your client to make that
8 motion?

9 MR. TAYLOR: I don't first of all
10 believe that the client is part of this
11 proceeding and is even recognized having an
12 interest in this proceeding.

13 So, whether or not I have
14 authority, I certainly would say that I
15 don't have any authority to that extent, but
16 I would just point out that as a participant
17 in this proceeding that the rulings that
18 this Board makes has significant
19 consequences for individual companies that
20 are not represented in this proceeding and
21 that I urge you to again reconsider.

22 CHIEF JUDGE SLEDGE: We're not

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1 reconsidering anything. You're making a
2 motion.

3 MR. TAYLOR: Right. Excuse me.
4 I would ask at this time just on this motion
5 to -- for the purpose of this motion that it
6 be admitted under the protective order.

7 CHIEF JUDGE SLEDGE: We'll
8 recess. We'll consider that.

9 Well, I'm sorry. Before we
10 recess, we'll go back on the record. Any
11 response to the motion? No response. All
12 right. We'll recess now.

13 (Whereupon, at 11:35 a.m. off the
14 record until 11:42 a.m.)

15 CHIEF JUDGE SLEDGE: We'll come
16 to order.

17 Mr. Taylor, with your candid
18 statement that you have no authority to make
19 this motion on behalf of Muzak, there is
20 nothing pending for the Court to consider.

21 BY MS. ABLIN:

22 Q Ms. Kessler, if you could turn to

1 page SX REB12343 of the report.

2 JUDGE WISNIEWSKI: That is
3 Exhibit 45?

4 MS. ABLIN: Yes, I'm sorry, Your
5 Honor. We are still on Services' Rebuttal
6 Exhibit 45. Yes.

7 CHIEF JUDGE SLEDGE: Not still.
8 We're back to it.

9 MS. ABLIN: I'm sorry. We are
10 back to it. I apologize. We are back to
11 it.

12 THE WITNESS: Yes.

13 BY MS. ABLIN:

14 Q Now, SoundExchange's auditor
15 claims that -- on this page that Muzak owed
16 it \$42,556 for what it called excess monthly
17 trial subscriptions. Is that true?

18 A That's correct.

19 Q And this claim is based on a
20 guess by SoundExchange's auditor that Muzak
21 should have received more in revenues than
22 it actually did from trial subscriptions and

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1 that SoundExchange, therefore, was entitled
2 to collect royalties on revenues that Muzak
3 did not actually receive.

4 A It's not based on a guess. It's
5 based on research and a calculation that had
6 these revenues been paid to Muzak,
7 SoundExchange's portion of that under the
8 statutory royalty rates would have been in
9 excess of \$42,000.

10 Q Okay. Let's look at paragraph 2
11 of this page. Do you see there that it says
12 that the statements supplied by EchoStar and
13 Muzak do not provide any detail regarding
14 paid subscribers versus trial subscriptions?

15 A Yes, that's what it says.

16 Q So, it would have been impossible
17 to tell which were paid and which were trial
18 subscriptions. Is that correct?

19 A This paragraph goes on to say
20 that based on the language of the agreement
21 Muzak should have been paying for any trial
22 subscriptions.

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1 Q Right. But, there is no detail
2 from which to tell whether there are
3 actually, in fact, trial subscriptions for
4 which EchoStar is not paying Muzak. Isn't
5 that true?

6 A And we would like Muzak to
7 explain to us what that is. That's why we
8 put this in the audit report and give them a
9 chance to respond to this. Based on our
10 calculation, it resulted in a 42,000
11 underpayment.

12 Q But, again, your calculation was
13 not based on hard data that you were seeing.
14 Isn't that true?

15 A It was based on an estimate and
16 based on research as stated in the first
17 paragraph.

18 Q And, in fact, if you look at
19 paragraph 3 on this page, the last sentence.
20 SoundExchange's auditor says that we believe
21 that it is appropriate to estimate the
22 potential underpayment that may have

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1 occurred due to Muzak's failure to verify
2 the accuracy of the data submitted by
3 EchoStar.

4 A Yes, it's an estimate.

5 Q And so, again, this claim is
6 based on an attempt by SoundExchange to act
7 as functionally a third-part beneficiary to
8 the Muzak/EchoStar contract and seek to
9 force Muzak to enforce it's contractual
10 rights.

11 A Copyright owners and artists are
12 not third-party beneficiaries. This royalty
13 is due to them under the statute.

14 Q No, but --

15 A To the extent that Muzak did not
16 collect all of its revenues that it could,
17 that directly harmed our copyright owners
18 and artists an they should have collected
19 that money and paid us our 6%, 7 or 7½
20 percent on those revenues.

21 Q And SoundExchange was asserting
22 the legal right to force Muzak to enforce

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1 whatever contractual rights it may enjoy
2 against EchoStar.

3 A I'm not a lawyer. I'm not sure
4 which rights are being asserted and which
5 ones aren't. What I'm saying as a practical
6 matter if Muzak doesn't collect all its
7 revenues, then our copyright owners and
8 artists don't collect their share of those.

9 Q So, this claim again is based on
10 a claim for royalties based on revenues that
11 Muzak did not actually receive.

12 MR. SMITH: Asked and answered,
13 Your Honor.

14 CHIEF JUDGE SLEDGE: Sustained.

15 BY MS. ABLIN:

16 Q Muzak, in fact, informed
17 SoundExchange that it had received
18 assurances from EchoStar that no free trial
19 subscriptions involving Muzak's music
20 channels were offered or provided during the
21 audit period. Isn't that true?

22 A I'm sorry. Where do you see

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1 that?

2 Q If I could direct your attention
3 now back to Services' Rebuttal Exhibit 46
4 which has been handed out. Page SX-
5 REB12378.

6 A Yes.

7 Q So, my statement was true that
8 Muzak had informed SoundExchange that it had
9 -- you look at section 3. It had received
10 assurances from EchoStar that no free trial
11 subscriptions involving Muzak's music
12 channels were offered or provided during the
13 audit period in question. Correct?

14 A That's Muzak's claim in this
15 document. Yes.

16 Q Okay. If you could turn to SX-
17 REB12344 and that page reference is back to
18 Services' Rebuttal Exhibit 45.

19 CHIEF JUDGE SLEDGE: What page?

20 MS. ABLIN: SX-REB12344, Your
21 Honor.

22 THE WITNESS: Yes.

1 BY MS. ABLIN:

2 Q Now, in this claim,
3 SoundExchange's auditor asserted that Muzak
4 owed \$263,284 for what it called late charge
5 payments, EchoStar to Muzak. Is that true?

6 A That's correct.

7 Q And this claim is based on the
8 notion that Muzak should have collected more
9 in late fees from EchoStar than it actually
10 did and that SoundExchange was entitled to a
11 royalty percent share of those uncollected
12 late fees that Muzak never received. Is
13 that true?

14 A That's correct.

15 Q And Muzak, in fact, informed
16 SoundExchange that while -- actually, let me
17 -- I'll save us some time. I'll refer you
18 back to Services' Rebuttal Exhibit 46, page
19 SX-REB12378. If you could look at the
20 bottom paragraph there.

21 It's true, is it not, that Muzak,
22 in fact, informed SoundExchange that while

1 it has used from time to time the threat of
2 late charges as a collections tool, Muzak
3 LLC views the assessment of late charges as
4 a discretionary right. Is that correct?

5 A That is their claim. Yes.

6 Q And it further informs
7 SoundExchange of its view that the actual
8 assessment of late fees has repercussions in
9 supplier relationship. Is that true?

10 A Again, that's their claim. Yes.

11 Q Okay. Now, let's turn to SX-
12 REB12340 in Services' Rebuttal Exhibit 45.

13 A In Exhibit 45?

14 Q Yes, 12340. If you could take a
15 look at that page.

16 A Yes.

17 Q Now, have you had a chance to
18 look at it? Okay. Now, on this page,
19 SoundExchange's auditor claimed that Muzak
20 owed it \$149,929 in late fees. Is that
21 true?

22 A That's correct.

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1 Q And the vast majority of that
2 amount, i.e., 137,441, the figure just above
3 the top of -- the bottom of the page, were
4 late fees asserted on the audit claim monies
5 we just went through above. Is that true?

6 A Yes.

7 Q And again those audit claim
8 monies that we just spent quite a bit of
9 time going through were assessed against
10 revenues that Muzak did not actually
11 receive. Is that true?

12 MR. SMITH: Objection. Asked and
13 answered, Your Honor.

14 CHIEF JUDGE SLEDGE: Sustained.

15 BY MS. ABLIN:

16 Q Okay. Let's look at the other
17 \$12,488 in claimed late fees on this same
18 page in Exhibit 45, 12340.

19 A Yes.

20 Q Now, this amount, the 12,000 and
21 change reflects asserted late fees on
22 royalties actually paid by Muzak that

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1 SoundExchange claimed were late. Is that
2 true?

3 A That's correct.

4 Q And this page states that
5 additional information concerning this
6 claimed \$12,000 and change amount is
7 provided on schedule 1. Is that true?

8 A That's true.

9 Q Okay. So, let's turn to schedule
10 1 which is -- you can find it in Services'
11 Rebuttal Exhibit 45 starting at page SX-
12 REB12347 and it continues on to 52.

13 A Yes.

14 Q And if I could specifically
15 direct you to the last page of this schedule
16 12352.

17 A Yes.

18 Q And do you see it just at the
19 end. There's a column labeled total three
20 years and at the bottom of the column, you
21 will find the \$12,488 that we were just
22 discussing a minute ago.

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1 A Yes.

2 Q Okay. Now, I take it that this
3 schedule sets forth the receipt dates from
4 Muzak's payments and compares them with the
5 claimed due dates to then calculate reported
6 late fees based on the number of days late
7 SoundExchange asserted Muzak was for each
8 payment. Is that true?

9 A It appears so. Yes.

10 Q If you could turn to page SX-
11 REB12349.

12 A Yes.

13 Q And we'll also be looking at the
14 following three pages continuing on through
15 the end of this schedule at 52.

16 Now, starting with page 12349.

17 A Yes.

18 Q This page calculates the payment
19 due dates for January through June 2002 as
20 20 days after the end of the month to which
21 the payment applies. Is that true?

22 A The due date is 20 days after the

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1 end of the month. Yes.

2 Q Okay. And the same is true on
3 12350 for months July '02 through December
4 '02? The due date is 20 days after the end
5 of the month to which the payment applies?

6 A It appears so. Yes.

7 Q And finally on 12351, the same is
8 true for the months January '03 through June
9 '03?

10 A It appears so. Yes.

11 Q And one more month. If you could
12 flip to the page 12352. Again for just July
13 '03, the payment due date used in this
14 report again is 20 days after the end of the
15 month to which the payment applies.

16 A Yes, it appears so.

17 Q Okay. But, it's true, is it not,
18 that the rates and terms applicable to
19 preexisting subscription services actually
20 set forth the due date of September 15th,
21 2003 for transmissions made between January
22 1, 2002 and July 31st, 2003?

1 A I'm not sure.

2 Q Handing out an exhibit that's
3 been marked as Services' Rebuttal Exhibit
4 47.

5 A Thank you.

6 Q And as the document states, this
7 is a provision from the Code of Federal
8 Regulations Title 37 and it sets forth the
9 rates and terms for preexisting subscription
10 services and the Section 260.3 is entitled
11 terms for making payment of royalty fees.

12 A That's correct.

13 (Whereupon, the document
14 was marked as Services'
15 Rebuttal Exhibit 47 for
16 identification.)

17 BY MS. ABLIN:

18 Q Now, if I could direct your
19 attention to Subsection F of this section.
20 It states there, does it not, that a
21 licensee shall make any payments due under
22 260.2A which sets out the rates for digital

1 transmissions or ephemeral phono records
2 made between January 1, 2002 and July 31st,
3 2003 to the designated agent less any
4 amounts previously paid by such period to
5 the Recording Industry Association of
6 America or SoundExchange by September 15th,
7 2003?

8 A Yes, it says that.

9 Q So, this sets forth a due date of
10 September 15th, 2003 for transmissions that
11 occurred from January '02 through July '03?

12 MR. SMITH: Objection. They're
13 asking that the witness interpret the
14 regulation, Your Honor. This is an area of
15 dispute between SoundExchange and the
16 webcasters and just arguing the law here at
17 this point in an area where Ms. Ablin knows
18 well there were two sides to the
19 interpretation of this document. She's
20 trying to get a concession out of a lay
21 witness about a legal issue.

22 CHIEF JUDGE SLEDGE: Rebut.

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1 MS. ABLIN: Your Honor, I'm
2 simply --- I believe that Subsection F here
3 is very straightforward. It doesn't require
4 any legal expertise to read -- simply read
5 Subsection F which sets forth a due date of
6 September 15th, 2003 for transmissions made
7 between January '02 and July '03.

8 CHIEF JUDGE SLEDGE: Hence why
9 the question?

10 MS. ABLIN: I'm sorry.

11 CHIEF JUDGE SLEDGE: Hence why
12 the question?

13 MS. ABLIN: Okay. I will move
14 on.

15 BY MS. ABLIN:

16 Q Now, Ms. Kessler, looking back at
17 Schedule 1 in SoundExchange Rebuttal Exhibit
18 45, let's look at -- I'm sorry. Service --
19 I'm sorry. Services' Rebuttal Exhibit 45.

20 Looking at page SX-REB12349 and
21 if you could look at 50, 51 and 52 for the
22 time period we've talked about January '02

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1 through July '03.

2 A Yes.

3 Q And it is true is it not that
4 this schedule calculates late fees for time
5 periods within the time frame we were just
6 discussing where the payments were made
7 before September 15th, 2003. Is that
8 correct?

9 A It appears that the payment due
10 date is 20 days after the end of the month.
11 Yes.

12 Q But, I'm more interested in date
13 payment was made by Muzak to SoundExchange
14 which is the row below that.

15 A Yes.

16 Q And let's -- for clarity's sake,
17 let's look at January 2002. So, we're
18 looking at a specific month.

19 So, this states that on May 30th
20 -- I'm sorry. On March 18th, 2002, Muzak
21 made a payment to SoundExchange?

22 A Yes, it made an initial payment

1 apparently.

2 Q And moving down two clusters down
3 the rows, then you see computation of late
4 payment interest and there's a figure there
5 of \$633.66.

6 A That's correct.

7 Q So, late fees were calculated on
8 a payment made on March 18th, 2002 covering
9 January -- the month of January 2002. Is
10 that correct?

11 A That's correct.

12 Q And there are other months, in
13 fact, for which the same facts would apply.
14 Correct?

15 A Yes.

16 Q Okay. I will not take the time
17 to go through all of those months.

18 Now, if you could look at --
19 staying on this page, note two, according to
20 this report, SoundExchange did not give
21 Muzak any credit for early payments or
22 overpayments. Did it?

1 A It did not.

2 Q Okay. And, in fact, on some
3 occasions, Muzak did make early payments.
4 Is that true?

5 A Well --

6 JUDGE WISNIEWSKI: Ms. Ablin, if
7 I could ask you, what's the point of this
8 line of questioning. Are you suggesting
9 there's some dispute about the \$12,488 that
10 is the amount?

11 MS. ABLIN: Yes. Yes.

12 JUDGE WISNIEWSKI: Because it
13 seems like that's exactly what they said
14 they were going to pay.

15 MS. ABLIN: That is true, Your
16 Honor. I'm trying to establish that Muzak
17 was generous in agreeing to pay that.

18 BY MS. ABLIN:

19 Q So --

20 A Yes.

21 Q -- it's true that no credit --

22 well, we did that question. It's true that

1 on some occasions Muzak paid early.

2 A Muzak pays on an estimated basis.
3 Sometimes they get it right. Sometimes they
4 get it wrong. Sometimes they have to make a
5 make-up payment. Sometimes they pay late
6 typically and sometimes they pay a day or
7 two in advance, but yes, this chart
8 indicates that.

9 MS. ABLIN: I would move to admit
10 Services' Rebuttal Exhibit 45.

11 MR. SMITH: I believe that's
12 already evidence, Your Honor.

13 MS. ABLIN: I don't believe.

14 MR. SMITH: You do not. If it's
15 not, I have no objection.

16 MS. ABLIN: And if it is, I
17 withdraw my motion.

18 CHIEF JUDGE SLEDGE: It's a hell
19 of a way to run a railroad.

20 JUDGE ROBERTS: Mr. Smith, you
21 raised the protective order. Correct?

22 MR. SMITH: I believe I did, Your

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1 Honor. That's where the -- it may have been
2 with respect to reading something from it
3 rather than a motion of admission -- to
4 admit. At this point, I'm not sure, but I
5 did raise it and we had a conversation.

6 CHIEF JUDGE SLEDGE: I see no
7 offer.

8 MR. SMITH: No objection, Your
9 Honor.

10 CHIEF JUDGE SLEDGE: Without
11 objection the Exhibit 45 is admitted.

12 (Whereupon, the document
13 marked as Services'
14 Rebuttal Exhibit 45 was
15 received in evidence.)

16 CHIEF JUDGE SLEDGE: And the gist
17 of all that testimony is that because
18 SoundExchange made audit claims, it
19 collected additional royalties?

20 MS. ABLIN: I'm sorry. I didn't
21 follow you, Your Honor.

22 CHIEF JUDGE SLEDGE: And is the

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1 gist of all the evidence that you've just
2 presented from your questions that because
3 SoundExchange made audit claims, it
4 collected additional royalties?

5 MS. ABLIN: No, Your Honor, I
6 have about four more questions that
7 hopefully get to the gist of what that was
8 all about.

9 CHIEF JUDGE SLEDGE: All right.

10 BY MS. ABLIN:

11 Q So, just to summarize this
12 discussion, Ms. Kessler, that we've been
13 having, SoundExchange initially demanded
14 \$847,773 from Muzak as a result of its
15 audit?

16 A Yes.

17 Q And directing your attention to
18 Services' Rebuttal Exhibit 46, Muzak
19 rebutted or contested all but \$835,285 of
20 this amount?

21 A That's correct.

22 Q And offered to pay only \$12,488?

1 A That's correct.

2 Q Of the over \$847,000 claimed?

3 A Yes, we have a dispute.

4 Q And even of the \$12,488, at least
5 part of that could be disputed based on the
6 payment due dates that we just went through
7 a minute ago?

8 A Our position is that it is not --

9 Q But, it --

10 A -- in dispute. That they owe us
11 that money. Yes.

12 Q Okay. Well, we'll let the
13 statute speak for itself on this and so,
14 again, out of just under \$2 million, a
15 figure that we referred to in the beginning
16 of this discussion that Muzak had paid
17 SoundExchange during the audit period, Muzak
18 has agreed to pay a little over \$12,000?

19 A That's their current position.
20 Yes.

21 Q And that amounts to about 1/2 of 1
22 percent of Muzak's total royalties paid?

1 A I'll take your word for that.

2 Q Okay. Now, let's focus just very
3 briefly. It will not be anywhere near that
4 long of a discussion, but on SoundExchange's
5 audit of Music Choice, I'm handing out a
6 document that's been marked as Services'
7 Rebuttal Exhibit 48 and for the record, this
8 document is Bates numbered SX REB12461-504
9 and I will represent that this is a document
10 that was produced to us by SoundExchange in
11 discovery.

12 If I could direct your attention
13 to the second page of this report, SX-
14 REB12462.

15 A Yes.

16 Q This is a report that was
17 prepared on behalf of SoundExchange and it
18 sets forth various audit claims from
19 SoundExchange's audit of Music Choice which
20 covered the years 2001 to 2003. Is that
21 correct?

22 A That's correct.

1 (Whereupon, the document
2 was marked as Services'
3 Rebuttal Exhibit 48 for
4 identification.)

5 BY MS. ABLIN:

6 Q And if you could turn to page SX-
7 REB12504 which I believe is the last page of
8 this exhibit.

9 A Yes.

10 Q And do you see a line about two-
11 thirds of the way down the page that says
12 total payments received by SoundExchange?

13 A Yes, I do.

14 Q And so, the total payments that
15 Music Choice made to SoundExchange during
16 the 2001 to 2003 audit period was
17 \$5,612,343?

18 A That's correct.

19 Q Now, if you could please turn to
20 page SX-REB12462. I'm sorry 12463.

21 A Yes.

22 Q Now, this page is a summary page

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1 that sets forth the various audit claims
2 that SoundExchange asserted against Music
3 Choice.

4 A That's correct.

5 Q And the total amount asserted on
6 this page is \$920,203?

7 A That's correct.

8 MS. ABLIN: Your Honor, I would
9 move to admit Services' Rebuttal Exhibit 48.

10 CHIEF JUDGE SLEDGE: Any
11 objection?

12 MR. SMITH: I have no objection,
13 Your Honor. I would make what I guess has
14 become a -- kind of a pro forma motion for
15 application for a protective order pursuant
16 to our regulatory obligations.

17 CHIEF JUDGE SLEDGE: The exhibit
18 is admitted.

19 (Whereupon, the document
20 marked as Services'
21 Rebuttal Exhibit 48 was
22 received in evidence.)

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1 CHIEF JUDGE SLEDGE: The motion
2 to apply the protective order is denied.

3 BY MS. ABLIN:

4 Q Okay. Now, without going into
5 the detail that we just did with respect to
6 Muzak, it is fair to say, is it not, that
7 Music Choice disputed the vast majority of
8 the amount claimed by Sound Exchange on page
9 SX-REB12463?

10 A I would assume that they disputed
11 the vast majority. Yes.

12 Q Okay. I'm now going to hand out
13 an exhibit that's been marked as Services'
14 Rebuttal Exhibit 49 and for the record, this
15 document is Bates marked SX-REB127158-62 and
16 I will represent that this is a document
17 that SoundExchange produced to us in
18 discovery in this proceeding.

19 A Yes.

20 Q Now, this is a letter dated June
21 7th, 2006 that was sent by Music Choice's
22 Senior Director of Counting and Controls to

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1 SoundExchange's Auditor.

2 (Whereupon, the document
3 was marked as Services'
4 Rebuttal Exhibit 49 for
5 identification.)

6 BY MS. ABLIN:

7 Q Is that correct?

8 A That's correct.

9 Q And the letter sets forth Music
10 Choice's response to each of the audit
11 claims set forth in the initial report
12 prepared on SoundExchange's behalf. Is that
13 true?

14 A It does.

15 Q And if you could turn to 127162.

16 A Yes.

17 Q Now, according to Music Choice,
18 it did not owe the 900,000 and change amount
19 claimed in the report, but rather \$133,701.
20 Is that true?

21 A That's what this report says.

22 Yes.

1 MS. ABLIN: Your Honor, I would
2 move to submit Services' Rebuttal Exhibit
3 49.

4 CHIEF JUDGE SLEDGE: Any
5 objection to Exhibit 49?

6 MR. SMITH: No, Your Honor.

7 CHIEF JUDGE SLEDGE: Without
8 objection, it's admitted.

9 (Whereupon, the document
10 marked as Services'
11 Rebuttal Exhibit 49 was
12 received in evidence.)

13 BY MS. ABLIN:

14 Q Now, it's true that after
15 SoundExchange's Auditor received Music
16 Choice's response which is Services'
17 Rebuttal Exhibit 49, it realized that it had
18 made some errors in its initial report. Is
19 that true?

20 A I don't know if they're errors or
21 revisions or compromises. I don't know.

22 Q Okay. Well, let's -- I'll get

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1 the document in front of you. I'm handing
2 out what's been marked as Services' Rebuttal
3 Exhibit 50 and for the record, this document
4 is Bates marked SX-REB71725-36 and I will
5 again represent that this is a document that
6 SoundExchange produced to us in discovery.

7 Now, this is a June 15th, 2006
8 response from SoundExchange's Auditor to
9 Music Choice.

10 (Whereupon, the document
11 was marked as Services'
12 Rebuttal Exhibit 50 for
13 identification.)

14 BY MS. ABLIN:

15 Q Correct?

16 A That's correct.

17 Q And if I could direct your
18 attention to -- back to actually -- for a
19 moment, we're going to be looking at two
20 documents in tandem. Yes. Services'
21 Rebuttal Exhibit 48 page SX-REB12463 and if
22 you could look at claim eight on this

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1 summary page.

2 A Yes.

3 Q SoundExchange's Auditor had
4 initially included a claim eight in its
5 report for \$369,000.

6 A Yes, I see that.

7 Q Three hundred and sixty-nine
8 thousand and thirty-five dollars. Correct?

9 A Yes, I see that.

10 Q And in the June 15th letter that
11 was just marked as Services' Rebuttal
12 Exhibit 50, the auditor actually
13 acknowledged that that claim should be
14 revised down from that original amount to
15 \$55,429.

16 A The auditor concurred with Music
17 Choice on this particular line item. Yes.

18 Q And so, SoundExchange's Auditor
19 was off by at least \$313,606 -- \$313,606?

20 A Yes, SoundExchange's Auditor
21 agreed with Music Choice with respect to
22 this line item. Yes.

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1 Q Okay. And if you could look back
2 now to SX-REB12463 at claim 11B.

3 A Yes.

4 Q And SoundExchange's Auditor as to
5 that claim had initially asserted the right
6 to collect \$231,073?

7 A Yes, it was a similar
8 extrapolation issue that we concurred --
9 that our auditor concurred with Music
10 Choice.

11 Q And the auditor then revised down
12 its claim 11B, the \$34,462?

13 A It did indeed. Yes.

14 Q So, taking those two downward
15 revisions and adding them together,
16 SoundExchange's Auditor was off by over a
17 half a millions dollars in its initial audit
18 report?

19 A SoundExchange's Auditor concurred
20 with Music Choice that there were
21 extrapolations issues and they reduced those
22 two line items. Yes.

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1 Q By over half a million dollars?

2 A By -- yes, a half a million
3 dollars.

4 Q And that half a million dollars
5 was actually over one-half of the amount of
6 SoundExchange's initial entire audit claim
7 against Music Choice. Is that correct?

8 A Yes.

9 Q Okay. And the last exhibit. I'm
10 handing out a document that has been marked
11 as Services' Rebuttal Exhibit 51.

12 MS. ABLIN: And before I would do
13 that, I would move the admission of
14 Services' Rebuttal Exhibit 50.

15 CHIEF JUDGE SLEDGE: Any
16 objection to Exhibit 50?

17 MR. SMITH: No, Your Honor.

18 CHIEF JUDGE SLEDGE: Exhibit 50
19 is admitted.

20 (Whereupon, the document
21 marked as Services'
22 Rebuttal Exhibit 50 was

received in evidence.)

BY MS. ABLIN:

Q For the record, Services' Rebuttal Exhibit 51 has been Bates marked SX-REB71525-29 and again, I will represent that this document was produced by SoundExchange to us in discovery and for some reason, the cover letter to this document was produced as the last page. So, if I could direct your attention 71529.

A Yes.

Q Now, this is a September 1st, 2006 letter from Music Choice to SoundExchange enclosing a payment of \$141,536 for undisputed amounts listed in the audit.

(Whereupon, the document was marked as Services' Rebuttal Exhibit 51 for identification.)

BY MS. ABLIN:

Q Correct?

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1 A Yes, the letter says a check for
2 that amount is enclosed.

3 Q And deducting the approximately
4 half a million plus amount that
5 SoundExchange's Auditor had revised downward
6 that we just discussed, that leaves about
7 \$280,000 in dispute between the parties at
8 this time?

9 A Approximately.

10 Q Do you know how much of that
11 amount is still in dispute?

12 A I believe all of it.

13 Q Do you know whether SoundExchange
14 has abandoned any claims as to any portions
15 of the disputed amount?

16 A I suspect we would not have
17 abandoned any claim, but I don't know for
18 certain.

19 Q You don't know.

20 A I would suspect that we did not
21 abandoned any claim.

22 Q You suspect, but you don't know

1 for certain. Is that correct?

2 A It's what I said. Yes.

3 Q Okay. So, as of today, the only
4 undisputed amount from the audit of the
5 million dollars was the 141,000 and change
6 paid by Music Choice?

7 A I'm sorry. Repeat that.

8 Q As of today as we're sitting here
9 or standing here today, the only undisputed
10 amount out of the nearly \$1 million
11 initially claimed by SoundExchange was
12 \$141,000 and change paid by Music Choice in
13 this letter?

14 A No, that's the amount that they
15 agreed to pay and concurred that were
16 undisputed.

17 Q Right. I'm not asking about
18 disputed amounts. Just undisputed amounts.

19 A Yes, this is the undisputed
20 amount.

21 Q Okay. Yes, that's the undisputed
22 amount. Okay.

1 A By them. Yes.

2 Q And that compares -- that
3 undisputed amount compares to a total of
4 about \$5.6 million that Music Choice paid to
5 SoundExchange during 2001 through 2003?

6 A That's correct.

7 Q And that's about 2½ percent?
8 This undisputed amount is about 2½ percent
9 of the total amounts paid to SoundExchange
10 for this audit period. Correct?

11 A Take your word for it. Yes.

12 MS. ABLIN: I have no further
13 questions.

14 Actually, I'm sorry, Your Honor.
15 I would like to move into admission this
16 last exhibit, Services' Rebuttal Exhibit 51.

17 CHIEF JUDGE SLEDGE: Any
18 objection to Exhibit 51?

19 MR. SMITH: No, Your Honor.

20 CHIEF JUDGE SLEDGE: Without
21 objection, it's admitted.

22 (Whereupon, the document

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marked as Services'

Rebuttal Exhibit 51 was
received in evidence.)

CHIEF JUDGE SLEDGE: All right.

Given the time, we'll recess for midday
break and return at 2:00.

(Whereupon, the hearing was
recess at 12:22 p.m. to reconvene at 2:00
p.m. this same day.)

CHIEF JUDGE SLEDGE: Come to
order. Mr. Taylor.

MR. TAYLOR: Nothing, Your Honor.

CHIEF JUDGE SLEDGE: Please
proceed. You have nothing to ask? Thank
you.

MR. TAYLOR: As much as it may
surprise the Bench.

CHIEF JUDGE SLEDGE: I was so
expecting not that answer I didn't even hear
it.

Mr. Freundlich.

CROSS EXAMINATION

1 BY MR. FREUNDLICH:

2 Q Good afternoon, Ms. Kessler.

3 A Good afternoon.

4 Q I have a few questions for you.

5 You've testified previously and in your
6 rebuttal that direct licensing is an
7 alternative to those persons who were
8 disaffected by SoundExchange. Is that
9 correct?

10 A Direct licensing is always an
11 option to the statutory licensing scheme.
12 That's correct.

13 Q But, it is true is it not, Ms.
14 Kessler, that in the overwhelming majority
15 of cases artists cannot issue direct
16 licenses because they don't own the
17 copyrights?

18 A The copyright owners are the one
19 who practice the licensing.

20 Q Right. So, the artists can't do
21 that if they don't own the copyrights.
22 Right?

1 A Well, the licensing function
2 isn't a function of the artists. It's that
3 of the copyright owner.

4 Q And isn't it also true that
5 copyright owners cannot enter into a direct
6 license transaction unless there is a user
7 that is willing to enter into such a
8 transaction?

9 A Well, a transaction requires two
10 parties. That would be the licensee and the
11 licenser. Yes.

12 Q Right. So, the answer is yes to
13 that question? Is it true?

14 A Well, the direct license would
15 have to have a service and a licenser of
16 copyrights. Yes.

17 Q So, there needs to be a willing
18 user to enter into such a transaction. Is
19 that correct?

20 A There has to be buyer as well as
21 a seller. Yes.

22 Q A willing buyer though. Correct?

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1 A If they don't enter into the
2 licensing agreement, then I guess they're
3 not willing.

4 Q And isn't it also true that if
5 the proposed direct license is on the same
6 terms as the statutory license, there would
7 be no incentive for any of these willing --
8 any users, strike that, to enter into such a
9 direct license?

10 A I don't know that that's the
11 case. I think that there is all kinds of
12 reasons why people would enter into a direct
13 license. You know, rates and terms are some
14 of those factors.

15 Q But, you'd agree would you not
16 that you'd at least have to give up certain
17 rights under the statutory license?

18 A I would not agree with that. No.

19 Q You wouldn't. In your testimony
20 in the direct case, you stated that there
21 are approximately 570 services and I believe
22 this morning would that number even increase

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1 to somewhere around 800 paying royalties to
2 SoundExchange under the statutory license.
3 Is that correct?

4 A That's correct.

5 Q Okay. So, it would be a
6 tremendous burden and it would be pretty
7 impractical would it not for copyright
8 owners who chose through direct license to
9 enter into separate direct licenses with
10 these 800 or so services? Wouldn't it, Ms.
11 Kessler?

12 A I don't know if it would be a
13 burden or not. It would depend on the rates
14 and terms that were offered in the direct
15 license and how that would incentivize the
16 service to enter into such agreement.

17 Q But, they'd have to enter into
18 800 separate agreements. Wouldn't they?

19 A I'm sure that they could
20 collectively direct license.

21 Q Could you repeat that?

22 A I believe that the services could

1 collectively direct license if they so
2 choose.

3 Q All right. But, there's a chance
4 that they wouldn't and then the copyright
5 holders would have to negotiate with each
6 one as opposed to getting the luxury of the
7 statutory license. Isn't that correct?

8 A Well, that's a hypothetical, but
9 again, any copyright owner can enter into a
10 direct license with a service if they so
11 choose. The rates and terms that
12 incentivize the parties to enter into such
13 an agreement are, you know, determined by
14 the parties.

15 Q But, you agree, do you not, that
16 with 800 separate services, it would be more
17 of a burden to enter into those kinds of
18 licenses on a direct licensing basis than to
19 just be able to invoke a statutory license.

20 A Well, the point of the statutory
21 license is to facilitate the licensing based
22 on certain rates and terms. That's true.

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1 Again, I think that the -- you
2 know, the question of the burden is
3 something you should ask the parties if that
4 would be burdensome to --

5 Q But, it's more burdensome to have
6 to do 800 separate licenses than just to
7 invoke the statute. Isn't it, Ms. Kessler?

8 A It may be. I can't stand in the
9 shoes of the copyright owners and the
10 services to answer that.

11 The statutory license is there
12 for a certain purpose. The reason why
13 services or copyright owners might enter
14 into direct license is they may have other
15 business reasons for doing so. In which
16 case, they would determine, you know,
17 themselves that is it not a burden to do so.

18 Direct licenses happen all the
19 time for, you know, the download services
20 and so forth and for the -- you know, the
21 offering of copyrights for interactive
22 purposes. That happens all the time.

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1 MR. FREUNDLICH: Can I move to
2 strike? I move to strike that last
3 sentence. There was no question pending.

4 CHIEF JUDGE SLEDGE: Motion
5 denied.

6 BY MR. FREUNDLICH:

7 Q Now, it's true, Ms. Kessler, that
8 the copyright statute requires payment to
9 artists to be made on a per sound recording
10 basis. Isn't that correct?

11 A Can you repeat that?

12 Q It's true that the copyright
13 statute requires payment to artists on a per
14 sound recording basis. Isn't that correct?

15 A My understanding of the statute
16 is there's a statutory split is 5 percent of
17 the non-featured. It's 45 to the featured.
18 Fifty percent to the copyright owners.

19 SoundExchange bases that
20 distribution on the purports of use received
21 by the services. In some cases, that's
22 census reporting. In other cases with the

1 most recent ruling, that will be on a sample
2 basis of two weeks per quarter. We allocate
3 the payments received against those sound
4 recordings and then determine how to split
5 the money at the group level, featured
6 artist level or the copyright owner.

7 Q I'm handing out what I've marked
8 as RLI Exhibit 15. This is a Copyright
9 Statute Section 114(g).

10 (Whereupon, the document
11 was marked as RLI
12 Exhibit 15 for
13 identification.)

14 Q It starts in the middle. It says
15 proceeds from licensing of transmissions.
16 Do you see that, Ms. Kessler?

17 A I'm sorry. It starts where?

18 Q In the middle of the first page,
19 it's a small g and it says proceeds from
20 licensing of transmissions.

21 A Yes.

22 Q Okay. And if you look down at

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1 (g)2A, it says 50 percent of the receipts
2 shall be paid to the copyright owner of the
3 exclusive right under Section 106.6 of this
4 Title and then if you look on the next page
5 in D which is right before three. So, it's
6 2(a) and I'm contrasting that with 2(d). It
7 says 45 percent of the receipts shall be
8 paid on a per sound recording basis to the
9 recording artist.

10 A That's what it says. Yes.

11 Q Okay. So, there's a difference
12 between the basis that this statute says you
13 paid in d to the artists and then a to the
14 copyright artist. Isn't that correct? One
15 says on a per sound recording basis and one
16 does not.

17 A The word sound recording is
18 indeed missing from the prior section that
19 you cited.

20 Q On a per sound recording basis is
21 missing. Correct?

22 A That's correct.

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1 Q Okay. So, does this mean that
2 and does SoundExchange, in fact, have two
3 payment mechanisms for the artists and the
4 labels? One on a per sound recording basis
5 and one not.

6 A No, SoundExchange distributes
7 based on the reports of use provided by the
8 Services. The reports of use contain play
9 lists and usage information on a sound
10 recording basis or a performance basis.

11 Q But, do you pay the labels on a
12 per sound recording basis?

13 A Yes, we do.

14 Q Okay. So, you've -- strike that.
15 But, the statute in 2(a) doesn't require you
16 to pay the labels on a per sound recording
17 basis. Does it?

18 A The word sound recording is
19 missing from that section. However, we --
20 we are required to pay based on the reports
21 of use that we receive by the Services which
22 are sound recording based.

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1 Q And did the SoundExchange Board
2 set the policies pursuant to which it was
3 decided to pay the labels on a per sound
4 recording basis even though it doesn't say
5 that in the statute?

6 A Well, the -- it's either in the
7 regulations or in the statute that we're to
8 distribute based on the reports of use that
9 we receive and that's the basis for the
10 policy of how we distribute.

11 It isn't policy. It's
12 instructions in the regulations in the
13 statute.

14 Q But, the statute doesn't
15 instruct. Does it?

16 A Again, elsewhere it states that
17 we're to distribute based on the reports of
18 use that we receive from the Services.
19 Those reports of use are listings of sound
20 recordings and, therefore, that's why we
21 distribute on that basis.

22 Q So, is it your testimony, Ms.

1 Kessler, that competing collective couldn't
2 adopt different distribution policies
3 regarding payment to the labels?

4 A SoundExchange distributes on a
5 nondiscriminatory basis because we represent
6 both members and nonmembers.

7 Members of a collective who agree
8 to distribute on some other basis I believe
9 are -- are able to do so.

10 SoundExchange on -- on the other
11 hand because we represent the universe of
12 copyright owners and artists has to
13 distribute on a nondiscriminatory basis and,
14 therefore, we distribute according to the
15 regulations on reports of the use that are
16 provided by the Services.

17 Q Right. But, a competing
18 collective who, for example, doesn't
19 represent nonmembers could, in fact, adopt a
20 different policy?

21 A Members can agree to distribute
22 anyway that they choose.

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1 Q Now, you make the point, Ms.
2 Kessler, that competition on distribution
3 policies is a recipe for disaster. Are you
4 familiar with that comment you made?

5 A Yes, I am.

6 Q But, Ms. Kessler, isn't it true
7 that SoundExchange makes a policy decision
8 every time it makes a decision as to how to
9 budget for instance its litigation expenses
10 in this case?

11 A I don't -- I'm not sure I
12 understand the question.

13 Q Isn't that a decision that you
14 have to make regarding for instance how many
15 lawyers you'll have in the room at any given
16 point in time, which firm you're going to
17 hire, how much your budget's going to be.
18 Isn't that a policy decision that
19 SoundExchange makes?

20 A Those budgetary and resource
21 decisions that are presented to our finance
22 committee which are comprised of copyright

1 owners and artists and then submitted to our
2 full board also comprised equally of
3 copyright owners and artists and they're the
4 ones making the decisions on how to spend
5 their money.

6 Q So, your board comprised of
7 copyright owners and artists as you
8 described, it makes the policy decision as
9 to how that -- how, for instance, the
10 litigation is going to be managed.

11 A Yes, as they represent the vast
12 majority of copyright owners and artists.

13 Q Okay. And isn't it also true
14 that SoundExchange makes a policy decision
15 when it decides how often to pay royalties
16 to its royalty recipients?

17 A Yes, SoundExchange makes a
18 determination based on a number of factors
19 including cost considerations of how
20 frequently to distribute which is quarterly
21 with discretionary supplemental
22 distributions.

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1 Q And isn't it also true that
2 SoundExchange makes a policy decision when
3 it decides what information is to be
4 included on its statements, for example?

5 A SoundExchange includes on its
6 statement everything that is permitted to
7 under the regulations which is each and
8 every sound recording in an aggregate form
9 across all license of a given license type.
10 So, we provide absolutely all the
11 information that we possibly -- that we
12 receive from the Services that we're
13 permitted to under the regulations.

14 Q Do you remember a dialogue we had
15 several months ago where you adapted the
16 motion that some of the suggestions that I
17 was making about the statements might, in
18 fact, be a good idea and you were going to
19 bring those back to the board?

20 A For example?

21 Q I don't remember the details. I
22 just remember this dialogue. I'm asking you

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1 if you remember it. If you don't, that's
2 okay.

3 A I remember something about that.
4 Yes.

5 Q Okay. So, isn't there, in fact,
6 some discretion as to what you are and
7 aren't going to include on statements?

8 A I think what we were discussing
9 was the administration and that's the amount
10 of money deducted from the royalties to pay
11 for the collection and distribution of the
12 royalties. That information when I did go
13 back to SoundExchange to discuss is not as
14 straightforward as you might think. Because
15 each royalty stream may have a different
16 administration rate depending on the cost
17 that you're applying to that royalty stream.

18 We are required by private
19 license agreements and under the regulations
20 to aggregate certain information and,
21 therefore, it's difficult to come up with a
22 blended admin rate that truly reflects those

costs.

So, I think that was the suggestion you were making which is what we did take back and examine after -- after my testimony.

Q But, doesn't the mere fact that you took it back and examined it and even acknowledged my comments show that it's indeed a policy decision that SoundExchange has to consider what goes -- what does and doesn't go into its statements?

A Well, absent volumes and volumes and volumes of regulation, a collective is going to have to make certain decisions about how it conducts its work because we have a board equally comprised of copyright owners and artists and we represent the vast majority of all copyright owners and artists. They're the ones making the decisions on how to implement and administer this -- this right.

Q Okay. Ms. Kessler, isn't it also

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1 true that SoundExchange makes a policy
2 decision when it decides the timing of the
3 escheat of the monies that you hold for
4 instance for the unpaid list?

5 A There's a regulation in place
6 that states the collective may after three
7 years from the collection of the royalties
8 any -- any royalties that are unclaimed may
9 be used to offset the costs of collection
10 and distribution and I -- I believe that the
11 word may is -- is in that regulation and so,
12 SoundExchange through its board of directors
13 has extended that deadline on a number of
14 occasions to permit copyright owners and
15 artists to come forward and register with us
16 and so, that we maximize our distributions
17 to them.

18 Q So, the extension of that three
19 years using the "may" language as you
20 pointed out, isn't that a policy decision
21 that the SoundExchange board makes?

22 A Who represent the vast majority

1 of copyright owners and artists --

2 Q Okay.

3 A -- have made that decision to
4 extend that deadline in order to permit the
5 entitled parties to receive their royalties.
6 Yes.

7 Q Right. Now, you would agree
8 would you not that this is a decision, the
9 extension of the three years or not that
10 could be made differently by a competing
11 collective?

12 A The SoundExchange has made that
13 decision because we represent the copyright
14 owners and artists. A competing collective
15 may, in fact, do something different. Yes.

16 Q You represent the copyright
17 owners and performers or you represent
18 SoundExchange's copyright owners and
19 performers, Ms. Kessler?

20 A No, we -- we represent through
21 out board the vast majority of copyright
22 owners and artists. We currently are the

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1 sole designated agent and, therefore, we are
2 responsible for distributing to absolutely
3 everyone.

4 Q And isn't it also true that
5 SoundExchange makes a policy decision when
6 it decides, for example, the terms of
7 repayment of its loan from the RIAA?

8 A SoundExchange does not make
9 decision about that. That's pursuant to a
10 promissory notes that we have with the RIAA.

11 Q Yes, but didn't somebody have to
12 negotiate the terms of that note, Ms.
13 Kessler?

14 A Well, we make no subsequent
15 policy decisions around how we repay that.
16 That's expressly stated in the promissory
17 note.

18 Q Did the RIAA make that decision
19 for you?

20 A I'm not exactly sure how the
21 promissory note came to be. I wasn't
22 involved in it.

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1 Q Okay. And isn't it also true
2 that SoundExchange makes a policy decision
3 when it decides, for example, to hire and
4 fire people and to set salaries and bonuses
5 to the employees?

6 A Hiring and firing decisions are
7 spelled out in the bylaws of SoundExchange
8 and those are left up to John Simson and
9 myself.

10 The salaries and so forth and
11 other costs that SoundExchange incurs during
12 the course of the year is done through a
13 budgeting process that's submitted to our
14 finance committee comprised of three
15 copyright owners, three artists. Then
16 submitted to the full board at an annual
17 board meeting and they vote on whether the
18 budget should be accepted as submitted or
19 changes ought to be made and that includes
20 the salaries.

21 Q You mentioned that the decision
22 to hire and fire people is provided for in

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1 the bylaws. Are those bylaws publicly
2 available anywhere?

3 A I believe that are. Yes.

4 Q Where would that be?

5 A Well, I don't know honestly. I -
6 - they might be on the website. I don't
7 know.

8 Q Do you know for sure whether
9 they're available publicly?

10 A No, I do not.

11 Q If somebody wrote you a letter
12 and said, you know, Dear Ms. Kessler, I'd
13 like to see a copy of your bylaws, would you
14 send it to them?

15 A I'd give that request to our
16 general counsel and ask for his advice and
17 counsel on that and if he determined that
18 they were to be sent to that party, we would
19 do so.

20 Q Have you ever seen them on the
21 SoundExchange website, the bylaws?

22 A Not that I can recall.

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1 Q Okay. Now, isn't it also true
2 that SoundExchange makes a policy decision
3 when it decides, for example, when to
4 publish the list of the unpaid artists and
5 labels on its website?

6 A I'm not sure if these things
7 you're calling policy are policies. These
8 are operational functions of the
9 organization.

10 The publishing of that list was
11 also a recommendation through our
12 distribution policy committee that was given
13 to the full board and they voted on when
14 they wanted to published that list.

15 Q And isn't it true that there's a
16 policy decision by SoundExchange when it
17 decides, for example, who to put on these
18 lists, who to list on the list?

19 A Who to list on the list.

20 Q On the unpaid list.

21 A Well, the list is really featured
22 artists and copyright owners who haven't

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1 come forward to claim their royalties.
2 Those that haven't claimed their royalties
3 for the royalty period that's about to be
4 released are the artists and copyright
5 owners who are on the list. So, the list --
6 no one decides who's on the list. You're
7 either on the list or you're off the list.

8 Q Did the list that you recently
9 published in September '06 include anybody
10 who were recent unpaid royalty recipients or
11 was that list just restricted to a period
12 from years ago, 2000 and before?

13 A The -- the -- the list currently
14 on the SoundExchange website are those
15 copyright owners and artists whose royalties
16 are subject to release from the period
17 February of '96 through March of 2000.

18 Q And didn't the board make the
19 decision as to the scope of the list that
20 was going to get published?

21 A They made a determination of
22 which royalties they were going to subject

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1 to the release which was that period and so,
2 therefore, we looked at the artists and the
3 copyright owners who were part of those
4 royalties that were at risk of being
5 forfeited and published that list.

6 Q But, given the three-year statute
7 that you referred to, couldn't the board
8 have pushed the list forward and listed some
9 people beyond 2000?

10 A We will list those at a later
11 date, but remember that we also have the
12 plays database with each and every
13 performance of any service that we've
14 distributed for and any artist or label can
15 go to the plays database and find their
16 performances there.

17 This was simply a subset of the
18 plays database to streamline the process of
19 artists and copyright owners who were
20 subject to the release date so that they
21 could easily find themselves and register
22 with SoundExchange.

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1 Q Thank you, Ms. Kessler. Now,
2 this statute also provides, and I believe
3 you discussed with Ms. Ablin earlier today,
4 that SoundExchange has an audit right with
5 respect to the Services. Is that correct?

6 A That's correct.

7 Q Okay. And SoundExchange as we
8 discussed earlier initiated an audit against
9 Bonneville, for example, in December of '05
10 and we saw documents about that earlier. Is
11 that correct?

12 A We noticed them of the audit.
13 Yes.

14 Q Okay. And indeed, Bonneville
15 took the position that the scope of your
16 request, the -- I don't remember the exact
17 number of questions, but there was a whole
18 bunch of questions in the initial letter,
19 was over broad and SoundExchange disagreed
20 with their characterization of the letter.
21 Correct?

22 A I'm not sure which of the

1 Services that we noticed to audit have
2 disagreed with the scope of the audit. I
3 know, for example, Yahoo is one of the
4 Services that objected to the scope of the
5 questionnaire.

6 Q Now, isn't the scope of the audit
7 an issue of statutory interpretation? I.E.,
8 what it is that the audit right conveys on
9 SoundExchange?

10 A I'm not sure I understand your
11 question.

12 Q Don't you have discretion as to
13 what questions you might ask and how you
14 conduct the audit?

15 A Well, as -- as you can imagine,
16 the point of the audit is to verify that the
17 payments made to SoundExchange are accurate.
18 In the world of webcasting, it's not simply
19 a matter of doing a financial audit. It's
20 more of a technical audit where we have to
21 look at the server logs and a lot of
22 technical infrastructure and architecture to

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1 determine if the software that they were
2 using or the processes or the systems that
3 they had in place were, in fact, adequate in
4 order to count the aggregate tuning hours
5 and the number of performances.

6 So, therefore, it's quite
7 technical in nature and a questionnaire is
8 the easiest way for us to get the
9 information of changes that may have
10 occurred over the audit period or what the
11 architecture looks like of the -- of the
12 service so that we can determine if those
13 payments that were made based on usage were
14 correct.

15 Q Is this questionnaire something
16 standard that I could find, for instance, on
17 the Internet somewhere or is it something
18 that has to be customized and was, in fact,
19 customized by SoundExchange and its
20 representative?

21 A SoundExchange with the assistance
22 of their audit -- of our audit partners

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1 developed the questionnaire.

2 Q Okay. And isn't it true, Ms.
3 Kessler, that a reasonable competing
4 collective could have determined the scope
5 of its audit letter differently? Perhaps
6 more broadly or more narrowly?

7 A A competing collective could do
8 that. They could also free ride on
9 SoundExchange's efforts in terms of audits
10 and compliance and enforcement and allow
11 SoundExchange to do all that work.

12 Q And in response to Ms. Ablin's
13 questions this morning, the exhibits showed
14 if you recall that with respect to
15 Bonneville, SoundExchange didn't follow up
16 on the audit until October of '06 when Mr.
17 Greenstein asked Bonneville for consent to
18 switch auditors. Is that correct?

19 A I'm not sure what you mean by
20 follow up. We didn't initiate the audit
21 yet.

22 Q Okay. So --

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1 A We -- we -- we --

2 Q Sorry.

3 A -- we notified them of our intent
4 to audit and based on operational decisions,
5 we began the process in 2006 and asked their
6 permission to change auditors from the one
7 that we noticed in the prior year.

8 Q And that was -- and the one that
9 you noticed in the prior year hadn't begun
10 the audit yet. Had it?

11 A We had not started the audit. We
12 simply had put them on notice that we
13 intended to conduct that audit.

14 Q And nine months passed between
15 that notice date and the date when you sent
16 the letter to switch auditors and commenced
17 the audit. Correct?

18 A That's correct.

19 Q Okay. Now, isn't waiting nine
20 months, for instance, to follow up on your
21 audit, isn't that a policy decision that you
22 make in interpreting your audit rights under

1 the statute?

2 A Well, it was less of a policy
3 decision than a -- than a practical fact
4 that there is not very -- there are no
5 companies out there that have this
6 capability. This is a new right. These are
7 first-time audits. They have to develop
8 their procedures and policies around this.
9 You know, you have to determine what
10 technical information that we need in order
11 to verify that the payments were correct.
12 This is a lengthy process that SoundExchange
13 has been working on for some time.

14 Q But, it is possible, Ms. Kessler,
15 is it not, that a reasonable collective
16 could have been more aggressive with respect
17 to these audits? This audit in particular.

18 A Well, I disagree with that. We
19 were firm aggressive and we searched high
20 and low for firms that could conduct these
21 sorts of audits. I mean you know that
22 digital delivery of music isn't -- hasn't

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1 been around all that long and as you may
2 know, there are very few companies that are
3 auditing on the download side of the world,
4 let alone on the streaming side.

5 Q But, a competing collective could
6 have followed up in less than nine months.
7 Couldn't they have?

8 A I don't know how they could have.
9 We couldn't.

10 Q And SoundExchange makes decisions
11 like the ones that I've been discussing in
12 the last ten minutes everyday in its
13 operations. Doesn't it?

14 A SoundExchange makes decisions all
15 the time in its operations on behalf of the
16 copyright owners and artists that we
17 represent. Yes.

18 Q And aren't these policy decisions
19 decisions over which competing collectives
20 can differ and compete, Ms. Kessler?

21 A These -- these are not policy
22 decisions. These are the implementation of

1 your role as a collection and distributing
2 agent. This is what you do when you run an
3 organization or -- or business and so, this
4 is -- this is the carrying out of the
5 responsibility when you are a designate
6 agent.

7 I'm not sure that all -- I
8 wouldn't agree with your characterization
9 that all of these are policies. These are
10 implementation decisions.

11 Q Well, can't these implementation
12 decisions be made differently by a competing
13 collective, Ms. Kessler?

14 A Yes, they could.

15 Q Now, Ms. Kessler, is it your
16 testimony that this is a zero sum game?
17 That any monies being used toward advances
18 will necessarily have to come from other
19 artists and copyright owners royalties?

20 A My testimony is that with the
21 statutory license there's a set amount of
22 money. If you're advancing money to one

1 artist and they fail to reach that level of
2 usage, you are necessarily paying them money
3 that would have gone to a different artist.

4 Q Well, Ms. Kessler, that's not the
5 case is it if RLI's investors, for example,
6 for whatever reason decided to provide money
7 to offer such advances without cross
8 collateralizing them against the statutory
9 royalty pool? Isn't it? Is it?

10 A You're saying that RLI will
11 advance nonstatutory royalty to statutory
12 royalty recipients?

13 Q RLI as proposed hypothetically.
14 Would it still be a zero sum game if
15 hypothetically RLI did propose to offer
16 advances without cross collateralizing that
17 money against the statutory royalty pool?

18 A Well, I have no doubt RLI would
19 only make such advances if there were
20 something in it for them. That they were
21 going to make that money back somehow.

22 Q And if they guessed wrong, it

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1 would be their business risk. Wouldn't it?

2 A I don't know. I don't know if --
3 if that then would come out of the pockets
4 of -- of other copyright owners and artists
5 that they represent. I don't know how you
6 would tune up those numbers.

7 Q But, couldn't SoundExchange go to
8 the equity markets themselves and seek a way
9 to fund similar advances?

10 A Our board has decided against
11 issuing advances. We believe we treat our
12 recipients in a nondiscriminatory fashion.
13 Our board has rejected the notion of
14 advances.

15 Q So, your board set a policy with
16 respect to not giving advances. Correct?

17 A Our Distribution Policy Committee
18 recommended against it and our board adopted
19 that policy. Yes.

20 CHIEF JUDGE SLEDGE: Mr.
21 Freundlich, let me make sure I understood
22 your next to last question. Are you

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1 suggesting that a collective authorized by
2 this Court would have the discretion to give
3 royalties which it holds in trust as
4 collateral for any debt?

5 MR. FREUNDLICH: No, not at all.
6 In fact, I'm stating that these advances
7 that we're contemplating that RLI, that Mr.
8 Gertz testified about that I was asking
9 about would not be cross collateralized.
10 There would be monies coming from other
11 sources than the statutory royalties.

12 CHIEF JUDGE SLEDGE: I thought
13 your question was -- you asked if
14 SoundExchange could go to the equity market
15 to raise these advances.

16 MR. FREUNDLICH: Right. But, not
17 necessarily to cross collateralize them
18 against the statutory royalties. I'm not
19 suggesting that SoundExchange could do that
20 or should do that.

21 CHIEF JUDGE SLEDGE: And you
22 could go to the equity market without giving

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1 them collateral?

2 MR. FREUNDLICH: It's a question
3 of whether that financing is available on
4 whatever basis.

5 I don't have anything else.

6 CHIEF JUDGE SLEDGE: Mr. Smith.

7 MR. SMITH: Thank you, Your
8 Honor.

9 REDIRECT EXAMINATION

10 BY MR. SMITH:

11 Q Ms. Kessler, could you explain
12 what you meant in your written rebuttal
13 testimony by the reference to recalcitrance
14 by webcasters in response to audits?

15 A Yes, the audits that we have
16 actively ongoing, the webcasters have been -
17 - they have delayed for great periods of
18 time responding to our request for the audit
19 or to fill out the questionnaire, to set up
20 meetings and calls with our auditors.
21 They're -- they're introducing delays into
22 the process. In my view, unnecessary

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1 delays.

2 Q Now, in addition to those that
3 you just mentioned, have you also been told
4 by some webcasters that they don't have any
5 data available to audit?

6 A Yes, we have been told that some
7 webcasters have no data to provide us.

8 Q And does that include not having
9 data available about what sounds they've
10 played in the past?

11 A Yes, it does. It has to do with
12 that and also we've gotten information that
13 they are calculating their usage on not an
14 aggregate tuning hour basis or performance
15 basis, but on some other basis not
16 prescribed by the statute or the regulation.

17 Q Has Clear Channel told you they
18 don't have any data available to audit?

19 A They have.

20 Q Now, just one last question. You
21 were asked about these two audits of the
22 Music Choice and Muzak and you said they

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1 ended in disputes. What remedies does
2 SoundExchange have at that point in the
3 process to resolve those disputes and
4 collect the money it thinks it's owed?

5 A The only resolution that I'm
6 aware of is a court action.

7 MR. SMITH: Thank you, Your
8 Honor.

9 CHIEF JUDGE SLEDGE: Mr. Larson.

10 MR. LARSON: No more questions,
11 Your Honor.

12 CHIEF JUDGE SLEDGE: Ms. Ablin.

13 MS. ABLIN: Just a couple, Your
14 Honor.

15 RE CROSS EXAMINATION

16 BY MS. ABLIN:

17 Q Ms. Kessler, you recall Mr. Smith
18 just asking you a minute ago about Clear
19 Channel and its statement that it did not
20 have data available. Was that a statement
21 with respect to record keeping data with
22 respect to the songs and artists that they

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1 played?

2 A That was in respect to the fact
3 that they only keep the last 30 days of the
4 performance information of the songs they
5 have streamed.

6 Q With respect to the performances
7 of the songs?

8 A Yes.

9 Q I'm just trying to clarify. Are
10 you talking about title and artist
11 information?

12 A I'm talking about play list
13 information that they've streamed and the
14 usage associated.

15 Q And you're aware that they're not
16 required to keep those records beyond two
17 weeks per calendar quarter?

18 A No, my understanding is they're
19 required to supply two weeks per calendar
20 quarter, but when the rights were issued,
21 the Services were put on notice to start
22 keeping that information and retaining that

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1 information so that when the delivery -- the
2 delivery and format specs were promulgated
3 in regulation, they would be able to turn
4 over those reports to SoundExchange.

5 Q Right. The reports to turn over
6 though span two weeks a calendar quarter.
7 They're not census reports that are required
8 to be turned over.

9 A They are two weeks per calendar
10 quarter. That's correct.

11 Q Okay.

12 MS. ABLIN: I have no more
13 questions.

14 CHIEF JUDGE SLEDGE: And what
15 steps has SoundExchange taken to enforce the
16 failure of Clear Channel to provide that
17 data?

18 THE WITNESS: We haven't made a
19 decision on how we're going to proceed
20 because the regulations on how to report
21 were just recently issued and because we
22 just uncovered this problem with Clear

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1 Channel not retaining such reports. We --
2 we have -- we are contemplating what our
3 options are.

4 In the past when Services have
5 not -- did not have any data to provide us,
6 for example, during the historical period
7 for webcasting, SoundExchange requested to
8 the Copyright Office we be permitted to use
9 a proxy for the distribution. A proxy
10 necessarily isn't a true reflection of the
11 use, but it was -- it was a form of rough
12 justice that we thought our copyright owners
13 and artists could live with because if the
14 reports aren't there, they aren't there.
15 There's no way to reconstruct them without
16 the data.

17 CHIEF JUDGE SLEDGE: What
18 authority would you have to use something
19 other than the data required by the record
20 keeping regulation?

21 THE WITNESS: Well, because we
22 were concerned about what authority we did

1 have, we asked the Copyright Office to
2 permit us to use reports of use from other
3 Services as the proxy for the webcasters.

4 CHIEF JUDGE SLEDGE: Has any
5 infringement actions been filed?

6 THE WITNESS: No, sir.

7 CHIEF JUDGE SLEDGE: Any other
8 questions from the Bench?

9 JUDGE ROBERTS: I just have a
10 few. Ms. Kessler, in Part 260, the terms
11 that were adopted by the CARP in the 2002
12 proceeding, there's a provision in there
13 that you have mentioned today about
14 confidentiality and the lack of ability to
15 share record information with copyright
16 owners.

17 Can you describe or provide any
18 background as to why that provision was
19 adopted in the prior proceeding?

20 THE WITNESS: My recollection and
21 understanding which may be a little vague is
22 that this was part of a package of -- of --

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1 of terms and was a give and take and -- and
2 through a negotiation that that term was
3 adopted. It -- I think it had to do with
4 being able to use that information in a rate
5 setting proceeding or in some other way
6 other than to provide copyright owners and
7 artists with information about the royalties
8 due to them.

9 JUDGE ROBERTS: Do you receive
10 requests from copyright owners and
11 performers to see that kind of information?

12 THE WITNESS: We get that quite
13 frequently. Yes.

14 JUDGE ROBERTS: And by quite
15 frequently, could you give approximation of
16 a number?

17 THE WITNESS: We get multiple
18 requests monthly.

19 JUDGE ROBERTS: Multiple requests
20 monthly.

21 THE WITNESS: Yes, I would say
22 copyright owners and artists are always

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1 wandering, you know, was I performed on this
2 service versus that service. We're not able
3 to provide that information.

4 When it comes to providing that
5 information in an audit report, we're not
6 permitted to do so. We have to get
7 permission of the audit target in order to
8 share that with our copyright owners and
9 artists.

10 It makes it very difficult for
11 any individual copyright owner to make the
12 determination.

13 If they believe that this
14 underpayment rises to the level of a
15 copyright infringement action or not, we're
16 unable to supply that information to them.

17 JUDGE ROBERTS: What is
18 SoundExchange's position as to that
19 provision?

20 THE WITNESS: We believe that the
21 -- the -- this information on the statements
22 of account as well as the reports of use

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1 should be public.

2 JUDGE ROBERTS: Thank you.

3 CHIEF JUDGE SLEDGE: Ms. Kessler,
4 when this term was adopted as part of the
5 regulation, how did the -- was there any
6 treatment of that by the CARP panel when the
7 parties submitted such a restriction on
8 public access to records?

9 THE WITNESS: I'm really not
10 sure, Your Honor. I know that in other
11 similar statutes, this type of information
12 is public. But, I don't recall what the
13 reasoning might have been in the CARP's
14 decision.

15 CHIEF JUDGE SLEDGE: In addition
16 to Clear Channel and in addition to the
17 prior testimony by Collegiate Broadcasters,
18 are you aware of any other services that are
19 not keeping the record keeping data as
20 required by the regulation?

21 THE WITNESS: Not yet, Your
22 Honor. I expect we'll come across that once

1 we know what the dates are when the reports
2 of use are to be submitted to SoundExchange.
3 I expect many Services not to have that
4 information thought.

5 CHIEF JUDGE SLEDGE: Do you have
6 any information other than what I said to
7 support that expectation?

8 THE WITNESS: Given my experience
9 with discussions, round tables before the
10 Copyright Office and though these
11 proceedings, my sense of it is that many of
12 these Services did not retain those reports
13 of use dating back to April of 2004.

14 I hope I'm wrong, but I don't
15 think I will be.

16 CHIEF JUDGE SLEDGE: And as I
17 understand your prior statement,
18 SoundExchange has not yet adopted a strategy
19 of action when it is determined that some
20 Services failed to keep the records required
21 by the regulations?

22 THE WITNESS: That's correct.

1 Because apart from a handful of webcasters
2 who have been voluntarily reporting, we
3 haven't received any reports of use since
4 your order in October. We don't yet know
5 who's able to comply and who's not. We need
6 a clarification on what date those reports
7 are due and once that deadline has past,
8 we'll have a much better sense of the
9 breadth of inability to report by the
10 Services.

11 CHIEF JUDGE SLEDGE: How could
12 you need a clarification? The regulation
13 says they're due now. What is unclear about
14 now?

15 THE WITNESS: I think it's party
16 for the retroactive reports from April of
17 2004 if I understand it correctly.

18 CHIEF JUDGE SLEDGE: Any other
19 questions? Any follow-up questions from the
20 questions from the Bench? Mr. Freundlich?

21 MR. FREUNDLICH: I have none.

22 CHIEF JUDGE SLEDGE: All right.

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1 Thank you.

2 That ends your testimony.

3 (Whereupon, the witness was
4 excused.)

5 CHIEF JUDGE SLEDGE: We'll take a
6 ten-minute recess.

7 (Whereupon, at 2:43 p.m. off the
8 record until 2:56 p.m.)

9 CHIEF JUDGE SLEDGE: We'll come
10 to order.

11 MR. LARSON: Your Honors, I just
12 wanted to jump in with one housekeeping
13 matter. I think --

14 CHIEF JUDGE SLEDGE: Yes, sir.

15 MR. LARSON: Mr. Taylor I believe
16 yesterday indicated that Gayle Rosenstein
17 from our firm would be here tomorrow and we
18 filed a notice of appearance yesterday on
19 her behalf and served it on opposing
20 counsel, but I don't know if it's made it's
21 way through to you yet. So, we brought
22 courtesy copies.

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1 JUDGE ROBERTS: Mr. Larson, is
2 Ms. Rosenstein going to be conducting any
3 cross examination?

4 MR. LARSON: I believe she will.
5 I'm not sure which one of them tomorrow.
6 But, yes, I believe --

7 JUDGE ROBERTS: Fine.

8 CHIEF JUDGE SLEDGE: We will look
9 at that carefully. I'm not sure she will be
10 conducting any cross examination at this
11 phase of the trial.

12 MR. LARSON: Okay. Sir, I --
13 something I should communicate then to her
14 or something --

15 CHIEF JUDGE SLEDGE: Well, I
16 think it's raises a real question when a
17 lawyer comes in the next to the last day of
18 the trial and start participating. So,
19 we'll have to look at that very carefully.

20 MR. LARSON: I will let Mr.
21 Steinthal and Ms. Rosenstein know that
22 you're -- that you --

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CHIEF JUDGE SLEDGE: Well, I said
the same thing yesterday.

MR. LARSON: I know. Yes.

MR. TAYLOR: And as Mr. Steinthal
said yesterday, Ms. Rosenstein has been
involved in this proceeding. She just has
not been here in D.C. for this proceeding
and to the extent that she does -- the Board
does decide to let her participate tomorrow,
she will be thoroughly apprised of the
Board's expectations.

CHIEF JUDGE SLEDGE: Thank you.

MR. HANDZO: Your Honor,
SoundExchange calls Simon Wheeler.

CHIEF JUDGE SLEDGE: Mr. Wheeler,
will you raise your right hand please.
Whereupon,

SIMON WHEELER
was called as a witness by Counsel for
SoundExchange and having been first duly
sworn, assumed the witness stand and was
examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANDZO:

Q For the record, sir, would you tell us your name?

A Simon Wheeler.

Q Mr. Wheeler, sitting in front of you there there's a little notebook. I just ask you to take a look at that and tell me if you can identify your witness statement for us.

A Yes, this is my statement.

Q Mr. Wheeler, where are you currently employed?

A I'm employed by the Beggar's Group of Labels in the UK.

Q What is the Beggar's Group of Labels?

A It's a group of six independent makers of labels, five from the UK and one in the U.S.

Q How long have you been employed by the Beggar's Group?

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1 A Seventeen years.

2 Q What do you do for them
3 currently?

4 A I'm the Director and Manager of
5 District Business.

6 Q Are you associated with any other
7 musical organizations in the UK?

8 A Yes, Beggar's Group is a member
9 of the trade association called the
10 Association of Independent Music and it
11 represents independent labels in the UK.

12 Q And what exactly does the
13 Association of Independent Music do on
14 behalf of its members?

15 A It's a not-for-profit trade body.
16 It's -- it provides information, referral
17 services and to the extent I'm involved in
18 the New Media Committee, it negotiates
19 commercial deals and again provides
20 information for its members.

21 Q Who are the members of the
22 Association of Independent Music?

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1 A There's currently about one
2 thousand UK independent record labels.

3 Q Has the Association of
4 Independent Music negotiated a license
5 agreement with Yahoo?

6 A Yes, it has.

7 Q When did it do that?

8 A The deal was closed in May 2004.

9 Q And what did that deal cover?
10 What sorts of services?

11 A It covered purely webcasting
12 services.

13 Q Now, what did Yahoo propose to
14 the Association of Independent Music with
15 respect to terms of payment?

16 A They were very clean, but the
17 agreement was based on a metric that
18 measured the amount of unique users per
19 month rather than the traditional per play
20 mechanism.

21 Q So, they offered to pay a certain
22 amount per unique user?

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1 A Yes, that's right. A -- a
2 prorated share per unique user per month.

3 Q Okay. What, if anything else,
4 did Yahoo propose with respect to how they
5 were going to use the music of Association
6 of Independent Music members?

7 A They were telling us that under
8 that license structure, they would be
9 profiling and programming our music more
10 heavily. So, we would get more plays and,
11 therefore, more money.

12 As part of the package, they also
13 promised us marketing commitments for two
14 channels consisting entirely of UK
15 independent music which again would increase
16 the plays and the revenue that we would
17 receive from the service and they also
18 promised free adequate inventory.

19 Q Did -- by the way, I'm going to
20 refer to the Association of Independent
21 Music as AIM just so that I don't keep
22 stumbling over it.

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1 Did AIM agree to those proposals?

2 A Yes, they did.

3 Q Why?

4 A At that point of time in 2004,
5 they digital the music market was relatively
6 young still. The revenues were relatively
7 low and also there was very little access
8 for UK independent music to the U.S. market
9 and in particular the radio market.

10 Yahoo pitched itself as the
11 world's biggest webcaster at that point in
12 time. So, the opportunity to get access to
13 that kind of size channel -- radio
14 programming channel for AIM's members was --
15 was quite compelling.

16 Q Now, how long did AIM negotiate
17 with Yahoo?

18 A It was for over a period of a
19 year.

20 Q And during that time was AIM able
21 to extract or negotiate any different terms
22 other than what Yahoo first proposed with

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1 respect to the terms of payment of the rate?

2 A The rates remained consistent
3 throughout that period of the year. The
4 concession that we did get was on the
5 marketing commitments.

6 Q Okay. But, on the financial
7 terms?

8 A No.

9 Q And why -- did AIM try and get
10 different financial terms?

11 A Yes, we were sent back to
12 negotiate on a rate per play by some of our
13 legal advisors, but that was categorically
14 denied. We didn't real feel that we had
15 enough muscle even acting collectively
16 against an organization the size of Yahoo.

17 Q And when you say it was rejected
18 categorically, it was rejected by Yahoo?

19 A Absolutely. It was a case of
20 this is the deal. We -- you have the deal -
21 - the deal that you've done.

22 Q Now, on page two of your written

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1 testimony, you refer to this as an
2 experimental agreement. Why did you
3 characterize it that way?

4 A We knew we were trying out a
5 different business model. The standard
6 metric for -- for -- for paying on -- on
7 performance is -- is per play. So, we -- we
8 were knew we were doing something slightly
9 difference, but I think AIM is an
10 organization. We're representing young and
11 agile companies and we're not trying to be
12 creative. It's about opening markets,
13 getting access to markets and -- and -- and,
14 therefore, you do have to experiment.
15 Sometimes the experiments work and sometimes
16 they don't.

17 Q Now, when AIM agreed to this
18 agreement, did that bind AIM's members?

19 A No, absolutely not. It's
20 important that any of these particularly
21 experimental agreements are only done on a
22 opt-in basis.

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1 Q And how many of AIM's members, if
2 you know, opted into this agreement?

3 A Approximately about 120 over the
4 course of the agreement and that's out of a
5 membership at the time of over 850.

6 Q And with respect to the larger
7 independent labels that are part of AIM, did
8 they opt-in?

9 A No, the -- the vast majority of
10 the larger labels, my own company included,
11 did not participate in the deal.

12 Q Of the companies that did opt-in,
13 do you have any sense of what the market
14 share is of those companies in the U.S.
15 market?

16 A It -- it would be fractions --
17 fractions of a percent. It's very, very
18 small indeed.

19 Q Okay. Now, what was the
20 experience of the member companies that did
21 opt-in under this agreement?

22 A I think disappointing would not

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1 be understating it. The revenues that were
2 promised, we didn't even see them coming up
3 to the very lowest and, of course, there was
4 some very conservative predictions. We were
5 told there was going to be increased plays
6 and increased revenues. The -- the -- the
7 revenues were more than disappointing. They
8 -- they didn't touch any of the predictions
9 that we were told during the course of the
10 negotiations.

11 Q And did you see the increased
12 play that had been promised?

13 A Absolutely not.

14 Q Is that agreement still in force?

15 A No, in April of this year, we had
16 received accounting from Yahoo for a period
17 of a year. So, we sent them a cease and
18 desist notice. They had 30 days to remedy
19 to supply the reporting which they supplied
20 in a very large pile of paper and when the
21 deal expired in -- in -- at the end of April
22 this year, AIM said categorically they were

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1 -- they had not intent of renewing the deal
2 and certainly not on the same metrics and
3 the same terms.

4 Q Thank you.

5 MR. HANDZO: I think that's all I
6 have if I can just take a minute to check my
7 notes. That's all I have. Thank you.

8 CHIEF JUDGE SLEDGE: Mr. Larson.

9 CROSS EXAMINATION

10 BY MR. LARSON:

11 Q Good afternoon, Mr. Wheeler. How
12 are you?

13 A Good.

14 Q My name's Todd Larson and I'm
15 here on behalf of Yahoo in this proceeding.

16 Before I ask you any questions
17 and there will just be few, I want to
18 handout what I've marked as Services'
19 Rebuttal Exhibit 52 which I suspect that we
20 need.

21 Mr. Wheeler, you are the Chair of
22 the New Media Committee at AIM. Is that

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1 correct?

2 A That's correct.

3 Q And as you said, you're an
4 executive at the Beggar's Group.

5 A Yes.

6 Q And that's one of AIM's biggest
7 and most prestigious labels. Correct?

8 A We're one of the larger groups of
9 labels in the UK. Yes.

10 Q And AIM you said has
11 approximately 1,000 members?

12 A That's -- that's about what it
13 stands at today.

14 Q Okay. And the agreement between
15 Yahoo and AIM was a form agreement which AIM
16 agreed to publicize to its members who could
17 then opt-in or not. Correct?

18 A Yes.

19 Q Okay. Do you --

20 CHIEF JUDGE SLEDGE: Is that a
21 yes?

22 THE WITNESS: Yes.

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1 BY MR. LARSON:

2 Q Do you recall Yahoo expressing
3 that it valued AIM's participation because
4 it could report and account to a single
5 organization rather than to 900 or 1,000
6 individual organizations?

7 A No, that was never part of the
8 negotiations, but it did appear in the final
9 form and was not anything that was discussed
10 or approved at either the New Media
11 Committee or the Business Affairs Committee
12 which is how the process works at AIM.

13 Q Right. So, the final agreement
14 did provide for a single collection agent
15 that would in turn distribute royalties to
16 the participating AIM labels?

17 A It did.

18 Q All right. Okay. Now, did you
19 personally negotiate the Yahoo agreement on
20 behalf on AIM?

21 A No, I didn't. No.

22 Q That was someone named Steve

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1 Johnston?

2 A That's correct. Right.

3 Q Okay. And you said the final
4 deal was signed off on in May and, in fact,
5 is dated April 29th of 2004?

6 A Yes.

7 Q Okay. Now, is it true that Mr.
8 Johnston, in fact, signed off on the deal
9 before Beggar's had a chance to offer input
10 into the final agreement?

11 A It's a little unclear what
12 happened at the end of the sign-off process.
13 It had been through committees. Both in the
14 Media Committee which I chair and I have
15 full known of and the Business Affairs
16 Committee on numerous occasions and it's not
17 entirely clear to me what happened with the
18 sign-off process with that document.

19 Q Okay. But, the deal as signed
20 contained some changes with which you
21 personally disagreed. Correct?

22 A Not just me personally, but I

1 think the larger labels in general and a
2 number of the labels which didn't opt into
3 the deal.

4 Q All right. In fact, you wanted
5 to have direct reporting to the
6 participating labels rather than a
7 centralized reporting and payment through
8 AIM.

9 A It's was a key function of any
10 AIM negotiated deal. AIM is an
11 organization. It doesn't have the resource
12 and has never had the resource to collect
13 and distribute funds on behalf of its
14 members.

15 Q Okay. And as you said, Beggar's
16 actually refused to opt into the agreement?

17 A Yes.

18 Q And Sanctuary, another
19 independent label, refused as well?

20 A Sanctuary Ministry of Sounds,
21 most of the larger independent groups.

22 Q Okay. And this may be an obvious

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1 question, but I take it the basis of your
2 statement then is based on your role as a
3 committee member in AIM and not based on the
4 participation of your company?

5 A That's correct. Yes and the
6 Chair of the New Media Committee role.

7 Q Okay. Now, do you recall that
8 the agreement had a point system whereby the
9 independent labels who opted in were
10 assigned a certain number of points?

11 A Yes, I do.

12 Q That was five, three or I think
13 half a point depending on their size.

14 A That's correct.

15 Q Right and then the idea in the
16 agreement was that the advance that would be
17 paid under the agreement and the
18 administrative fees would be determined in
19 part based on how many points were accrued?

20 A Yes, it was an accrual system.
21 Yes.

22 Q Right. And is it your

1 recollection that Yahoo as part of the
2 negotiations was informed by AIM that --
3 that those targets would be hit?

4 A Well, that was the intent.
5 Otherwise, we wouldn't have set those
6 targets and, therefore, would be expecting
7 to get the money. So, yes.

8 Q Okay. Let me just -- if I could
9 have you look at what's marked as Exhibit
10 52. You recognize this as the agreement
11 that was produced in discovery and provided
12 by you?

13 A Yes.

14 Q Okay.

15 (Whereupon, the document
16 was marked as Services'
17 Rebuttal Exhibit 52 for
18 identification.)

19 BY MR. LARSON:

20 Q And you note in 3.1 which is on
21 page six, the last sentence of that
22 paragraph. Are you with me?

1 You can take a moment if you want
2 to review the entire paragraph and what I
3 want to point your attention to specifically
4 is the last sentence which says that Yahoo
5 shall make a fully recoupable, non-
6 refundable advance payment to AIM in the
7 amount to be calculated in accordance with
8 the Yahoo launch cast proposal for payment
9 of advance document dated as of October 2nd,
10 2003.

11 A Yes.

12 Q Do you see that?

13 A Okay. I'm going to hand out
14 another exhibit which I'll mark as Services'
15 Rebuttal Exhibit 53.

16 Q Mr. Wheeler, do you recognize
17 this as the October 2nd, 2003 proposal
18 that's referred to in the agreement itself?

19 A Yes, I do.

20 Q Okay.

21 (Whereupon, the document

22 was marked as Services'

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Rebuttal Exhibit 53 for
identification.)

BY MR. LARSON:

Q And this is the document that
spells out this point system that we were
talking about. Correct?

A Yes.

Q Okay. Could you take a look at
the last page please? And you see here it
say the deal availability was communicated
to all members in an e-mail dated 28 August.
I presume that's 2003. Is that --

A Yes.

Q The initial response to that
yielded four As, 22 Bs. The As and Bs are
asterisked above and 24 others plus 98
points. These 50 labels between them
contribute 40 to 50,000 tracks and then the
following sentence says it is expected that
in the order of 16 to 20 A labels, 35 to 40
Bs and upwards of 30 others will join the
license within four to six weeks of the

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1 communication phase.

2 Do you see that?

3 A Yes.

4 Q So, Yahoo was it not was informed
5 by AIM months before the deal closed that
6 there were close to 100 labels that were
7 interested in signing up for the deal.
8 Correct?

9 A Interested, yes.

10 Q And are you aware of how many
11 labels opted in when the deal with signed?

12 A I don't know. I just know the
13 last total that I've got which is around
14 about 120.

15 Q Are you aware that only 22 opted
16 in May of 2004?

17 A That doesn't surprise me with the
18 way that the deal changed.

19 Q Are you aware that only 25 had
20 opted in by January of 2005?

21 A It doesn't surprise me the way
22 the deal changed to be honest.

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1 Q And are you aware that only a
2 prorated portion of the advance was
3 ultimately paid because not enough companies
4 opted in?

5 A Well, I wouldn't have expected
6 the full advance, but not being on the AIM
7 board and not being privy to the financial
8 affairs, I'm not aware exactly how much was
9 paid or if any was paid.

10 Q Now, you make representations
11 about the experience working under the deal
12 in terms of the revenue that was paid under
13 the deal. Correct?

14 A That's correct.

15 Q Did you analyze the income that
16 any particular company received under the
17 deal to compare that to what they would have
18 received under the CARP rates?

19 A With the report delivered in the
20 form that it was on a bundle of paper, AIM
21 is still going through that report and it's
22 almost indecipherable to try to work out

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1 exactly how much each label got anyway. So,
2 that analysis isn't possible with the form
3 of reporting that we received.

4 Q So, let me just ask. What's the
5 basis for your testimony that the revenue
6 received was, in fact, lower than promised?

7 A That's based on the total sum of
8 money that was received in royalties from
9 AIM -- to AIM. Sorry.

10 Q Now, you said Mr. Johnston was
11 the chief contact with Yahoo. Correct?

12 A That's correct.

13 Q And are you aware of difficulties
14 that Yahoo had getting Mr. Johnston to
15 pursue AIM labels to get them to opt in?

16 A I would have thought it would be
17 quite hard. Independent labels by
18 definition are independent. Independently
19 minded and run independently. We don't
20 conform to any one particular pattern and we
21 don't all upgrade the same way.

22 Q So, is the answer yes?

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1 A I think you could say I would
2 expect it's going to be quite hard.

3 Q Okay. Now, is it true that Mr.
4 Johnston lost his job at AIM?

5 A That is true.

6 Q And what was the reason for that?

7 A We didn't find a satisfactory
8 working relationship.

9 Q And was it in part based on his
10 negotiations or involvement with this Yahoo
11 agreement?

12 A No, it wasn't. No.

13 Q A Mr. Kylo took over. Is that
14 correct?

15 A That's correct.

16 Q And is it true that after Mr.
17 Kylo took over the Yahoo relationship that
18 the number of labels that had opted in
19 jumped from approximately 25 to over 130?

20 A I'm not quite sure about the time
21 scale of the labels opting in.

22 Q When you said that your

1 understanding was that there were I think
2 you said 120 labels that had opted in, do
3 you --

4 CHIEF JUDGE SLEDGE: Mr. Larson,
5 was that Mr. Kyle?

6 MR. LARSON: Kylo K-Y-L-L-O.

7 CHIEF JUDGE SLEDGE: Thank you.

8 BY MR. LARSON:

9 Q When you said that the number
10 that you believe that opted in was around
11 120, did you have a time frame associated
12 with that?

13 A I was just looking at the last
14 contract report sheet that I had.

15 Q And what date would that have
16 been?

17 A I believe that was from June
18 2005.

19 Q In fact, Mr. Kylo was still
20 signing up labels as early as January of
21 this year. Correct?

22 A I would have thought that's

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1 correct.

2 Q Now, under the agreement and do
3 you recall that Yahoo was to take delivery
4 of CDs from participating labels at a
5 payment of four pounds each?

6 A That was one of the mechanisms
7 that was discussed. Yes.

8 Q Well, let me point your attention
9 to paragraph 3.10 of Exhibit 52. I think
10 that's on page eight.

11 A Yes.

12 Q Do you see Yahoo may place orders
13 for the delivery of the CD from the label in
14 respective recordings licensed and Yahoo
15 will pay label four pounds per album
16 including shipping and delivery?

17 A Yes.

18 Q Does that refresh your
19 recollection that Yahoo was to take delivery
20 from the labels at four pounds per album?

21 A Yes, it does. There were other
22 delivery mechanisms discussed which never

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made it into the final document.

Q And are you aware that as it turned out Yahoo instead had to purchase the albums from a separate distributor at a cost of eight pounds per album?

A Actually, what we found is that Yahoo had already purchased a lot of the albums including Cats and Repertoire and had loaded them onto the service before any deal with signed.

So, that's my understanding of it as far as my particular repertoire is concerned.

Q Okay. But, you again, Beggar's, is not a company that opted into the agreement. Correct?

A It wasn't, but it's -- our albums were still purchased and uploaded onto the service.

Q Right and they were eventually taken down. Correct?

A Eventually. Yes.

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1 Q Now, are you aware that with the
2 limited number of companies that actually
3 opted in that Yahoo actually had difficulty
4 programming a new UK indie station that
5 would meet the requirements of the DCMA?

6 A There has been so little
7 communication from Yahoo I don't think we
8 could have known anything like that.

9 Q Incidentally, you didn't know when
10 you entered the deal that there would be the
11 reporting problems that eventually occurred.
12 Did you?

13 A We didn't enter the deal
14 specifically, but as I generally know, we
15 wouldn't have expected there to be the
16 reporting problems from a digital company.

17 Q Just a couple of more questions.
18 You mentioned before that it was compelling
19 to you to attempt to get play on United
20 States webcasting stations. Is that
21 accurate?

22 A I think it would have been a

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1 compelling offering for AIM to bring to its
2 labels. Yes.

3 Q And that's because you felt that
4 exposure in the United States on Internet
5 radio stations was valuable for your
6 artists?

7 A We thought it would be a good
8 source of revenue for our artists and
9 labels.

10 MR. LARSON: I have not more
11 questions. Actually, if I could -- Your
12 Honor, if I could move just before I finish
13 Exhibit 53 into evidence.

14 CHIEF JUDGE SLEDGE: Any
15 objection to Exhibit 53?

16 MR. HANDZO: No.

17 CHIEF JUDGE SLEDGE: Without
18 objection, it's admitted.

19 MR. LARSON: Thank you.

20 (Whereupon, the document
21 marked as Services'
22 Rebuttal Exhibit 53 was

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received in evidence.)

CHIEF JUDGE SLEDGE:

Broadcasters?

MR. ASTLE: No, Your Honor.

CHIEF JUDGE SLEDGE: NPR?

MR. TAYLOR: Yes, Your Honor,
just a few.

CROSS EXAMINATION

BY MR. TAYLOR:

Q Good afternoon, Mr. Wheeler. How
are you?

A Good.

Q Good. Thanks for flying over for
this proceeding. We have one of our own
attorneys flying back over to the UK. So,
maybe you all will pass in the sky.

I'm a little interested in your
statement here. Have you ever heard of
Beatlemania?

A Of?

Q Beatlemania.

A Yes, I have.

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1 Q For us, it's Beatlemania and the
2 British Invasion?

3 A Yes, that's correct.

4 Q And so, I guess I'm having a
5 little problem reconciling when you say has
6 had a great -- your companies have had a
7 great deal of difficulty breaking into the
8 U.S. market.

9 A I'm talking specifically about UK
10 independent companies as they exist now. I
11 think the Beatles were signed to AIM-based
12 company or they certainly are part of now a
13 major and the British Invasion spearheaded
14 by Oasis was actually signed to a UK
15 independent, but for the rest of the world,
16 it was licensed to Sony. So, it was going
17 through a major again.

18 I think for smaller companies, it
19 is quite hard to break into the U.S. radio
20 space.

21 Q And can you attribute that to any
22 specific thing? Is it just the fact that

1 your -- it can't be just the fact because
2 you're a UK independent. Is it?

3 A Not actually having a physical
4 presence in the United States is obviously a
5 barrier to entry into the United States as
6 well and then the media companies which we
7 need to work with to get access to this
8 particular market are such a considerable
9 size compared to the very small size. You
10 know, in some cases, one man in his bedroom.
11 Operations that we're talking about as part
12 of the Association of Independent Music.

13 Q Okay. And so, when you say
14 exposure in the U.S. market, how would you
15 get exposure in the U.S. market?

16 A It can come in many different
17 ways. Radio is just one element. Radio/TV,
18 any form of media. Any activity profile on
19 the Internet. Press, touring, shop space.
20 I mean the list goes on and on and on.

21 Q And exactly what is the
22 importance of the exposure in the U.S.

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1 market? Do you sell more albums? Do you
2 see more CDs, more downloads?

3 A Well, I think that would be the
4 traditional way of looking at it, but I
5 think now any form of music consumption will
6 be seen as a revenue stream.

7 So -- so, I guess what I'm trying
8 to say is increased consumption of our
9 music. However, that takes -- takes place.

10 Q Great. And how would -- but for
11 the exposure, how would the consumption take
12 place? If nobody's ever heard of you, how
13 would they consume your music?

14 A Well, there's -- there's -- of
15 undercurrent. There's a real word of mouth
16 thing which is happening on the Internet.
17 It's -- you know, it's moved from the
18 playground if you like through to people
19 connecting to each other online. There's a
20 lot of referrals. You can read about music
21 and get inspired by music. Actually,
22 hearing the music is an important part, but

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1 it's only a part of -- of -- of the exposure
2 that you need to actually get people to
3 consume more of your music.

4 Q You say it's an important part,
5 what evidence do you have of that?

6 A Seventeen years in the music
7 industry, an understanding or understanding
8 some of how people interact with music and
9 what turns them on so they buy some more
10 music I think. We don't have the resources
11 to do research on this subject.

12 Q I trust your learned opinion. I
13 just -- it's a typical question that we
14 lawyers ask. So, I guess the follow-up
15 question there is so, once there is some
16 amount of exposure and people have heard
17 you, then you would say that there is some
18 opportunity to break into the U.S. market
19 with sales or --

20 A Well, with sales or just
21 increased consumption nowadays. I don't
22 think we've got to be fixated on sales.

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1 There's more and more ways that people can
2 consume music nowadays and each of those
3 ways, there -- there -- there should be a
4 revenue stream of some sort back to the
5 rights owners and to the people that created
6 that music. There's going to be a lot of
7 small revenue streams coming through and
8 each one of those is going to be vitally
9 important if you're going to exist as a
10 music or entertainment company in the
11 future.

12 Q Thank you.

13 CHIEF JUDGE SLEDGE: Mr.
14 Freundlich.

15 MR. FREUNDLICH: I don't have any
16 questions for this witness.

17 CHIEF JUDGE SLEDGE: Mr. Handzo.

18 MR. HANDZO: No redirect, Your
19 Honor.

20 CHIEF JUDGE SLEDGE: Any
21 questions from the Bench? Thank you, sir.

22 THE WITNESS: Thank you.

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1 (Whereupon, the witness was
2 excused.)

3 MR. HANDZO: Your Honor,
4 SoundExchange's next witness is Mr. Lee. As
5 of 2:49, I was told he was on his way here.
6 So, if I can step out and I assume he's
7 here, but I need to go look.

8 CHIEF JUDGE SLEDGE: All right.

9 MR. HANDZO: Thank you.

10 CHIEF JUDGE SLEDGE: Just a
11 moment. Mr. Lee, would you please stand?

12 THE WITNESS: Yes, sir.

13 CHIEF JUDGE SLEDGE: If you'll
14 raise your right hand.

15 Whereupon,

16 TOM LEE

17 was called as a witness by Counsel for
18 SoundExchange and having been first duly
19 sworn, assumed the witness stand and was
20 examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MR. HANDZO:

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1 Q Sir, would you tell us your name
2 for the record?

3 A Tom Lee.

4 Q And, Mr. Lee, I put a notebook
5 there in front of you. Can you identify
6 what that is for us?

7 A Yes, this is the written rebuttal
8 testimony that I have submitted --

9 Q All right.

10 A -- for this proceeding.

11 Q Now, Mr. Lee, could you tell the
12 Judges how you've primarily earned your
13 living for the last three decades?

14 A Yes, I certainly can. I was a
15 member of the United States Marine Band for
16 24 years starting from '66 through 1990 and
17 that's -- that's how I learned my -- earned
18 my living for the first years of my life.

19 Q And does that mean you were a
20 member of the Armed Forces?

21 A It does. Yes.

22 Q And with the Marine Band, what

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1 instrument did you play?

2 A I played keyboards.

3 Q What does the Marine Band do?
4 Where does it play?

5 A The -- the task of the Marine
6 Band is to provide musical support for the
7 White House, Members of Congress, Supreme
8 Court Justices, high-ranking military
9 officials, lower-ranking military officials
10 and the community at large.

11 Q How many Presidents have you
12 played for?

13 A I started during the Johnson
14 administration and I averaged about three
15 days a week I suppose during that period of
16 time from '96 or from '66 to '90 and I
17 finished up during George Bush, Sr.
18 administration.

19 Q During the time that you were
20 playing with the Marine Band, did you also
21 play independently of the Band?

22 A During my off-duty hours, I

1 absolutely did play all over time for a
2 number of years with every kind of band,
3 whether it was big band, whether it was rock
4 and roll, whether it was country. All
5 kinds.

6 Q Mr. Lee, have you worked with or
7 for organizations that represent musicians
8 and performers?

9 A Yes, I have.

10 Q And which organization or
11 organizations?

12 A Well, I was one of the founding
13 members of NARAS, the NARAS Chapter here in
14 Washington, D.C., but in 1990, I became
15 elected to the position of
16 secretary/treasurer with the American
17 Federation of Musicians. That is
18 secretary/treasurer in the D.C. local.

19 Q Okay. You mentioned an
20 organization first. NARAS?

21 A It's the National Association of
22 Recording Arts and Sciences. They are the

1 folks that put the grammies on every
2 February.

3 Q Okay. And then going back to
4 what I'll refer to as AFM.

5 A Yes.

6 Q Which is the American Federation
7 of Musicians?

8 A Of the United States and Canada.
9 Yes, sir.

10 Q Okay. First of all, what AFM do?

11 A AFM is a union of the AFL-CIO.
12 We negotiate industry-wide agreements on the
13 international level that would be with the
14 recording industry, with the motion picture
15 industry, with the television industry, with
16 the film industry, with the jingle industry,
17 with the radio industry and as well, we
18 represent our members in any legislation
19 that will have an impact on them that is
20 before Congress. That is both national
21 Congress and state Congresses.

22 Q How many members does AFM have?

1 A Approximately 100,000.

2 Q What positions have you held with
3 AFM?

4 A In 1990, I became the local
5 District of Columbia secretary/treasurer.
6 In '91, I became a member of the
7 international executive board. That's five
8 individuals selected from all over the
9 country. In 1995, I became vice president
10 of the Federation as well as maintaining my
11 local position. In 1999, I was appointed to
12 the position of secretary/treasurer of the
13 Federation and in 2001, I was elected to the
14 position of president of the Federation
15 which is the position I hold today.

16 Q And in that position, are you
17 authorized to speak on behalf of AFM?

18 A I absolutely am.

19 Q Okay. Now, Mr. Lee, what did you
20 hope to accomplish by joining AFM or working
21 with AFM?

22 A Originally, as a military

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1 musician, I was -- the American Federation
2 of Musicians would not allow me to join and
3 play in my off-duty time and there was also
4 a part of Title 10 that spoke to that issue.
5 It was my initial intent back in 1978 to
6 convince the American Federation of
7 Musicians to let me join and let me perform
8 along with every other Government worker who
9 was a musician and to exercise my rights to
10 -- to perform in this area.

11 During that period of time, I was
12 able to bring members of the military units
13 to talk to their Congressmen on Capitol Hill
14 and at the same time, convince the American
15 Federation of Musicians that it would be a
16 good thing to let us join.

17 Q And having won that battle, what
18 are you hoping to accomplish for musicians?

19 A What I'm hoping to accomplish for
20 musicians is to represent their best
21 interest wherever those interest may lie and
22 wherever those events may take place.

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1 Q Okay. Now, Mr. Lee, are you
2 familiar with SoundExchange?

3 A Yes, I am.

4 Q How so?

5 A The Federation has been involved
6 prior to my becoming president with the
7 creation of SoundExchange. When I became
8 president of the Federation in 2001, I then
9 became a member of the board at
10 SoundExchange.

11 Q Are you currently serving as a
12 member of the board?

13 A I am not currently serving as a
14 member of the board.

15 Q When did you leave the
16 SoundExchange board?

17 A About a year ago. November of
18 2005.

19 Q And why did you leave the board?

20 A I left because the demands of
21 this job require me to travel with a great
22 amount of frequency. We have 250 locals

1 throughout the U.S. and Canada and I'm in
2 charge of the care and feeding of those
3 locals if you understand. Their demands of
4 negotiation do not adjust themselves for
5 meetings of SoundExchange and in order to
6 insure that we were well represented, I
7 appointed associate counsel to our general
8 counsel to my position on the board.

9 Q Do you remain in touch with
10 what's happening at SoundExchange?

11 A Absolutely.

12 Q Can you describe for us the
13 composition of the SoundExchange board?

14 A The SoundExchange board is made
15 up of nine members of copyright --
16 representatives of copyright owners and it's
17 made up of nine members of -- of
18 organizations that represent artists or
19 performers as well as agents, attorney,
20 managers who represent artists and
21 performers.

22 Q And do you recall what

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1 organizations that represent artists are
2 members of the board?

3 A Yes, the American Federation of
4 Musicians of course, AFTRA, the American
5 Federation of Radio and Television Artists,
6 NARAS, the National Association of Recording
7 Arts and Sciences and the Future of Music
8 Coalition as well.

9 Q Any major organizations of
10 musicians that aren't represented?

11 A None.

12 Q Now, Mr. Lee, can you tell us
13 generally what is the purpose of your
14 testimony here today?

15 A I'm speaking in favor of
16 SoundExchange being the sole designated
17 agent for the distribution of royalties.

18 Q Now, Mr. Lee, if you would turn
19 to page 4 of your written testimony where
20 you discuss the reasons that you believe
21 that SoundExchange should be the sole
22 designed agent.

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1 A Yes.

2 Q The first heading there talks
3 about the fact that SoundExchange is
4 governed jointly by performers and copyright
5 owners and, of course, you just described to
6 us the composition of the board, but --

7 A Yes.

8 Q -- tell us, you know, why that
9 matters to you.

10 A Well, I believe that when
11 Congress created this Act that -- created a
12 compulsory license for transmission of sound
13 recordings in a non-interactive fashion,
14 that the purpose for that Act was to insure
15 that musicians and performers and copyright
16 owners shared in a royalty payment that was
17 due under that Act.

18 There is -- and for that purpose,
19 there was not a rate that was created at
20 that time. There was not a Governmental
21 agency that was created to collect and --
22 and distribute the money. That was left to

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1 the parties to determine and during that
2 period of time, SoundExchange became its own
3 independent body.

4 That it is not -- it's a
5 nonprofit. It's not association --
6 associated with any organization. It will -
7 - it will soon be in its own dwelling and
8 the governance of that insures that --
9 insure that there is equal representation on
10 all decisions that are made. That is
11 copyright owners as well as artists.

12 Q Well, are there, you know,
13 examples that you can think of of decisions
14 that SoundExchange has made where you feel
15 that input on behalf of performers is
16 important?

17 A Yes, there are. Under the terms,
18 the -- the -- when you cannot find the
19 individuals that are entitled to the royalty
20 and you've searched for them over a period
21 of three years, under the terms, that money
22 can then be utilized to put back into the

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1 general funds of SoundExchange in order to
2 help cover the expense of administering
3 SoundExchange.

4 When the first three-year period
5 ended, there was an opportunity for us to
6 take some of the money that or all of the
7 money that we had not found for those
8 individuals that were entitled to that
9 royalty payment and put it back into the
10 general fund of SoundExchange.

11 The artist representatives as
12 well as the copyright representatives said
13 no, we believe that under the Act it is our
14 responsibility to do as much as we can to
15 find the individuals to whom this money
16 belongs. So, let's --- let's extend that
17 date by a year and see if we can find more
18 of the people that this money should go to.
19 That date was then extended a second year.

20 So, I believe that these two
21 representatives organizations of copyright
22 holders and performers had the ability and

1 had the understanding and had the
2 sensitivity to know that they were really --
3 we were really tasked with finding and doing
4 the best thing we can to find the people to
5 who that money should go.

6 Q Mr. Lee, are you familiar with an
7 organization called RLI?

8 A I am.

9 Q And to your knowledge, does RLI
10 guarantee any artist or performer
11 representation in its governance?

12 A It does not.

13 MR. FREUNDLICH: I object to this
14 line of questioning. There's no -- the
15 witness has not stated any foundation for
16 his knowledge about RLI.

17 CHIEF JUDGE SLEDGE: So, he said
18 he was familiar with it. What's the point
19 of foundation? I'm not --

20 MR. FREUNDLICH: I don't -- I
21 haven't heard anything about the basis of
22 his understanding or knowledge about RLI.

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1 CHIEF JUDGE SLEDGE: Overruled.

2 BY MR. HANDZO:

3 Q Mr. Lee, turning to page six of
4 your testimony, one of the other points that
5 you make with respect to SoundExchange is
6 that it's a nonprofit corporation.

7 A Yes.

8 Q Why does that matter?

9 A I believe if -- if there were --
10 I believe if there were a profit motive
11 involved, that it would have a significant
12 impact on the decisions that are made. The
13 -- the story that I just referenced, I
14 believe that if there were a profit motive
15 involved, at that point in time, it might
16 have been very easy to say you know what?
17 We can't find these folks. It's three
18 years. We have to make sure that we have a
19 10 percent return on our money or on our
20 investment. Therefore, let's put this back
21 into the fund and take this as a profit.

22 That very instance I think is --

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1 is quite possible and would have an impact
2 on decisions that are made.

3 Q Are there other examples you can
4 think of where profit motives might affect
5 decision making?

6 A Well, a profit motive might
7 affect decision making in terms of what it
8 is that I'm aware of that SoundExchange has
9 done. It has involved itself in these
10 proceedings. It is representing the
11 interest of copyright owners. It has gone
12 to some expense to bring individuals into
13 these proceedings that are necessary for
14 everyone's enlightenment and in that sense,
15 if -- if there were a for profit
16 organization involved, it would seem to me
17 that again one could say, you know, I don't
18 quite have the money to go to the expense of
19 bringing in individuals who might be
20 necessary for -- for a fair proceeding to
21 take place. So, we'll just not get involved
22 in that and I think that would be terribly

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1 detrimental to the people that I represent.

2 Q Now, Mr. Lee, later on in your
3 testimony, you state you think if there two
4 designated agents or three or five or
5 whatever the number was, that that would
6 result in inefficiencies and unfair
7 competition and let me just ask you first to
8 explain to us why you think multiple
9 designated agents whether it's two or
10 whatever would result in inefficiencies.

11 A Well, you would have multiple
12 agents doing basically the same work. You
13 would have to spend money on a computer
14 program. You'd have to have multiple staffs
15 to do basically the same work. You would
16 have similar expenses in the administering
17 of the fund and in my own concern, once you
18 begin to set up multiple agencies, you then
19 begin to dilute the pile of money that might
20 be available for distribution.

21 Once you set up multiple
22 agencies, for example, what if SoundExchange

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1 were to have two members of AeroSmith and --
2 and corporation X were to have the other two
3 members of AeroSmith? You could easily
4 become involved in a well, wait a minute. I
5 actually represent those folks. You don't
6 represent those folks and you could become
7 also involved in how much money is going to
8 be paid to each individual group through the
9 two agencies.

10 And in terms of that, I -- I
11 absolutely believe that it would delay
12 payments significantly and the more that
13 would be set up, the more difficulty you're
14 going to have with those kinds of disputes.

15 Q Would you be in favor of two
16 designated agents even if the second agent
17 was your organization, AFM?

18 A No.

19 Q Now, you also mentioned that you
20 thought if there were multiple designated
21 agents, there could -- there was specter of
22 unfair competition. Can you tell us what

1 you were referring to there?

2 A Well, yes, I was referring to the
3 fact that if -- if you have one designated
4 agent and they are tasked to do what is it
5 necessary to represent the musicians in a
6 proceeding like this or any other
7 proceedings, that has to be done. If you
8 had more than one designated agent, it is
9 quite conceivable that one of those agents
10 would say, you know, we're going to let
11 SoundExchange go ahead and -- and -- and
12 spend the money and do what is necessary to
13 represent the musicians.

14 There's no need for us to do a
15 duplication of that effort. We'll let them
16 do it and -- and that's what I meant by a
17 free ride. There would be no expense to
18 them. They would be able to distribute a
19 greater pile of money then and the
20 organization who went through the expense of
21 actually doing the work.

22 MR. HANDZO: May I just have a

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1 moment, Your Honor?

2 CHIEF JUDGE SLEDGE: Yes.

3 BY MR. HANDZO:

4 Q Thank you, Mr. Lee. That's all I
5 have.

6 A Thank you.

7 CHIEF JUDGE SLEDGE: Any
8 questions by DiMA?

9 MR. LARSON: No questions from
10 DiMA, Your Honor.

11 CHIEF JUDGE SLEDGE:
12 Broadcasters?

13 MR. ASTLE: No questions, Your
14 Honor.

15 CHIEF JUDGE SLEDGE: NPR?

16 MR. TAYLOR: No questions, Your
17 Honor.

18 CHIEF JUDGE SLEDGE: Mr.
19 Freundlich?

20 MR. FREUNDLICH: I have some
21 questions.

22 CROSS EXAMINATION

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BY MR. FREUNDLICH:

Q Good afternoon, Mr. Lee. My name is Kenneth Freundlich. I represent Royalty Logic RLI in this proceeding.

A Very good. Thank you.

Q Mr. Lee, let me ask you. Have you ever met Ron Gertz?

A I never have.

Q Have you ever met Doug Brainin?

A I never have.

Q Have you met anyone from Abry Partners before?

A I never have.

Q Have you ever had occasion to e-mail or speak with any of those persons on the phone?

A No.

Q So, is it fair to say then, Mr. Lee, that you're testimony in your written statement concerning RLI and MRI are all based on secondhand things that you learned from conversations with other people?

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1 A No.

2 Q And what is that?

3 A What I -- what my testimony was
4 based on was the written proceedings that I
5 reviewed prior to the creation of my own
6 document.

7 Q So, you created this document
8 yourself?

9 A In my position, I have staff who
10 write letters for me. They write columns
11 for me. They write opinion letters. I
12 generally give them the outline of what I'd
13 like for them to write and they do those
14 kinds of things.

15 In this situation, I asked our
16 attorneys to create a document that would
17 speak to the issues in hand. I said I will
18 then review it and I will edit it and every
19 word that is in here has been reviewed by me
20 and edited although I may not have written
21 every word.

22 Q Did you write any of the words in

1 there?

2 A I did write some of the words,
3 but I can't recall which ones they were.
4 They're inconsequential.

5 Q Okay. Did you personally review
6 any of the written proceedings in this
7 matter?

8 A I did.

9 Q And which ones were those?

10 A Those are the proceedings. They
11 were the written testimony that was given by
12 Mr. Gertz as well as the -- the -- the --
13 the discussion that took place where he was
14 questioned by both yourself and -- and a
15 representative I guess from SoundExchange as
16 well as the written testimony from Barrie
17 Kessler and the questioning that took place
18 with her oral presentation as well.

19 Q Have you ever done -- have you or
20 your union I should say ever done any
21 surveys informal or otherwise of your
22 members to elicit their views as to whether

1 or not there should be competition in this
2 arena for collecting statutory royalties
3 under 112 and 114?

4 A We have written articles in
5 International Musician about SoundExchange.
6 We have never done formal interviews. I've
7 never gotten any response from our 100,000
8 members suggesting that we needed it.

9 Q Is it your testimony here today
10 that the members of your union would favor -
11 - would not -- excuse me. Let me start
12 again.

13 A Sure.

14 Q Is it your testimony here today
15 that the members of your union would not
16 favor a competitive environment for the
17 collection of their statutory royalties
18 here?

19 A It is my testimony that the
20 members of my union have never said to me
21 that they would favor such a multiple system
22 and that -- I would certainly be unrealistic

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1 if I said there may not be one, two, three,
2 four or ten, but I would say out of 100,000
3 people that we're talking about, the huge
4 majority would not be favoring a multiple
5 system --

6 Q And what do you base that on?

7 A What do I base that on? The
8 responses that I have received -- that I've
9 received with regards to -- to our
10 involvement with SoundExchange which are
11 none.

12 Q Have you ever hypothesized with
13 members of your union that there could, in
14 fact, be more than one collective for their
15 royalties?

16 A I never have.

17 Q Have you ever told them about the
18 existence of RLI?

19 A I never have. No.

20 Q And just to be clear, AF of M has
21 a board seat and has had a board seat on
22 SoundExchange from the beginning of its

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1 inception to the present." Correct?

2 A Correct.

3 Q Okay. Now, you attached three
4 letters to your written testimony. If you
5 will, I just want to take a look at those.

6 A Okay.

7 Q Exhibit 239RP is a letter from
8 Kim Roberts Hedgepeth. Now, who is Ms.
9 Hedgepeth?

10 A She is the Executive Director of
11 AFTRA.

12 Q And AFTRA is also a SoundExchange
13 board member and has been one from the
14 inception --

15 A Yes, sir.

16 Q -- until now and is Ms. Hedgepeth
17 herself on the board today?

18 A I believe she is. Yes, sir.

19 Q And your second letter is from
20 someone called Barry Bergman. Do you know
21 Mr. Bergman?

22 A I do.

1 Q Okay. And is the Music Managers
2 Forum represented on the SoundExchange
3 board?

4 A Yes, I believe so.

5 Q And who's its representative on
6 the board?

7 A I believe it's Barry Bergman.

8 Q Could it be Perry Resnick?

9 A Yes, as a matter of fact, it is
10 Perry Resnick.

11 Q But, the Music Managers Forum has
12 a representative on the board as well?

13 A Yes. Yes.

14 Q And the third letter is from
15 someone called Rebecca Greenberg --

16 A Yes.

17 Q -- of the Recording Artist
18 Coalition?

19 A Yes.

20 Q And is the Recording Artist
21 Coalition as well represented on the
22 SoundExchange board?

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1 A They are.

2 Q And that would be by Jay Cooper
3 and Jay Rosenthal?

4 A That's correct.

5 Q So, in sum, Mr. Lee, each of
6 these letters that you've presented here
7 comes from a person who is either on the
8 SoundExchange board or represents an
9 organization with a seat or two on the
10 board. Is that correct?

11 A Yes, sir.

12 Q Now, you are aware are you not,
13 Mr. Lee, that in the performing rights
14 organization area there are three separate
15 organizations collecting and paying money?
16 Namely, BMI, ASCAP and SESAC.

17 A Oh, yes.

18 Q And isn't it true that they are
19 AF of M members who are also composers of
20 music?

21 A It's very likely. Yes.

22 Q And doesn't it follow that there

1 are AF of M members across the rosters of
2 all three of those PROs?

3 A It is very likely. Yes.

4 Q And would you agree that a goal
5 of a musician and a performer is to make
6 money and to maximize the amount of money
7 that they can potentially make?

8 A Yes, sir.

9 Q Okay. And are composers entitled
10 to performance royalties every time music is
11 played on television or radio?

12 A I believe that's the case.

13 Q So, would it be reasonable for
14 Bob Dylan, for example, to investigate which
15 collector would pay him the most money
16 before joining in the PRO?

17 A He may very -- he may very well
18 want to do that. There may be other issues
19 as well that he would investigate.

20 Q And if Mr. Dylan were a member of
21 ASCAP, for example, and learned that he
22 could get more money from SESAC, would it be

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1 reasonable for him to go to that collective?

2 A If that were the only criteria,
3 it may very well be.

4 Q So, if an artist, for example, or
5 an AF of M member could receive more money
6 from Royalty Logic or an alternative
7 collective than it could from SoundExchange,
8 wouldn't it be a prudent decision for that
9 artist or label to consider moving to that
10 alternative collective to collect royalties
11 here?

12 A Not from my point of view.

13 Q Why is that?

14 A Because if there were an
15 additional collective, you have the very
16 possibilities that I just suggested. If it
17 is a for-profit organization. The profit
18 motive will have an impact on the decisions
19 that are necessary to actually represent the
20 artist and do -- and take every measure to
21 insure that the -- the collections are to
22 the maximum and the rate is to the maximum.

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1 Q Are you aware that SESAC is a
2 for-profit corporation, Mr. Lee?

3 A I am not.

4 Q Okay. Are you aware that BMI
5 stands for Broadcast Music, Inc.?

6 A Yes, I am.

7 Q And that BMI is owned by the
8 broadcasters and has only broadcasters on
9 its board?

10 A I understand.

11 Q Okay. Well, wouldn't it be a
12 logical and sensible decision for AF of M
13 members who are composers to join BMI if BMI
14 gave them the highest amount of royalties
15 notwithstanding its ownership and who formed
16 it?

17 A It -- it may very well be. I
18 mean I -- I -- I don't know those
19 organizations well enough to -- to give a
20 definitive opinion, but from the little bit
21 of knowledge I have, I'm responding as well
22 as I can to your questions, but if you were

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1 -- I mean quite frankly, I would like to
2 know a lot more about their governance and
3 how they operate before I would give, you
4 know, an opinion that I'd be held to.

5 Q But, haven't, in fact, many of
6 your members actually joined BMI?

7 A I am sure that's the case.

8 Q And haven't many of your members
9 joined SESAC notwithstanding its status as a
10 for-profit corporation?

11 A That may very well be the case as
12 well. Yes.

13 I mean I have to say just for
14 clarification, I can't sit here and say have
15 many of your members. I am sure some of the
16 members have.

17 Q Thank you, Mr. Lee. I appreciate
18 the clarification.

19 A Sure.

20 Q Now, BMI's board decided, for
21 example, to take higher administrative costs
22 than ASCAP did and if BMI's members ended up

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1 not getting paid as much money as ASCAP,
2 wouldn't it stand to reason that BMI would
3 start losing members to ASCAP?

4 A Again, that may very well be the
5 case.

6 Q And if one of your members came
7 to you with that problem, would you
8 recommend that they stay with the collective
9 paying them the least amount of money?

10 A I would not be in a position to
11 make a recommendation of that until I really
12 understood, you know, the full nature of how
13 those organizations work.

14 Q If the operational costs of
15 Royalty Logic and SoundExchange on a monthly
16 basis were different and RLI was, in fact,
17 the low-cost provider, shouldn't a recipient
18 of royalties have the right to choose the
19 lowest possible cost provider?

20 A Well, there are a lot of other
21 factors that go into that, Mr. Freundlich.
22 I mean one of the -- one of the situations

1 that we're dealing with here is that in the
2 case of this performance right, it is a --
3 it is a rate that is set by a proceeding of
4 this nature.

5 In the instances that you were
6 talking about before with BMI, that's a
7 negotiation that takes place, but this is
8 set by statute. So, the rate is set here.

9 There should be no ability for
10 the SoundExchange not to be able to
11 administer this fund at the lowest possible
12 rate. Because you have the copyright owners
13 who are part of this fund and the governance
14 of this fund. You have the performers and
15 the performer organizations who are part of
16 this fund and I can only tell you as a
17 leader of a union, my members are watching
18 me all the time to insure that I don't spend
19 more money than I have to in their
20 negotiations, in the administration, in --
21 in every aspect of what we do.

22 And I believe that when you're

1 talking about AFM and AFTRA, you'll talking
2 about 180,000 performers. I can tell you
3 that if we don't do the best job we possibly
4 can in keeping those costs as low as
5 possible, we're going to hear about it.

6 So, my answer is I do not believe
7 it would be possible for Royalty Logic to
8 administer this fund or do a better job than
9 the SoundExchange that is presently in
10 place.

11 Q So, you don't think it's possible
12 that Royalty Logic could have a lower cost
13 structure than SoundExchange?

14 A Not in doing the same work.

15 Q Um-hum.

16 A But, even if that were the case,
17 when you're talking about a duplication of
18 services, you are talking about less money
19 going to the performers.

20 Q Well, wouldn't it be a rational
21 decision for someone -- for an AF of M
22 member to make if, in fact, Royalty Logic

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1 had a lower cost structure, that they should
2 go with Royalty Logic for getting their
3 royalties rather than SoundExchange?

4 A Again, I don't see how that's at
5 all possible.

6 Q Now, you state several reasons in
7 your direct statement here why SoundExchange
8 is the best choice and why RLI in your
9 opinion is unfit. Are you familiar with
10 that?

11 A Yes, I am.

12 Q Now, how can you that
13 SoundExchange is the overwhelming choice of
14 performers when there is no other choice,
15 Mr. Lee?

16 A Can you -- can you just point me
17 to the place that you're reading that?

18 Yes. Yes, I found it. It's on
19 page nine, the second paragraph.

20 Q Thank you, sir. How can you make
21 the statement that SoundExchange is the
22 overwhelming choice when there really isn't

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1 a choice?

2 A Well, there has been a choice.
3 RLI had a designated agent status from I
4 believe it was 2001 to 2002 or somewhere in
5 that time frame and there was nothing that
6 took place with RLI in terms of -- of any of
7 these proceedings or any involvement and,
8 you know, for that reason alone, we haven't
9 had no outpouring from our members. Our
10 members seem to be delighted that we're even
11 involved. I mean they -- they understand
12 that we went to Congress. We worked with
13 Congress along with a collection of artists
14 performing groups and we were capable of an
15 influence in getting this legislation
16 passed.

17 You're membership organizations.
18 That's what you do for your members and they
19 generally respect it and they respect the
20 opinion that you have. So, they generally
21 follow you when you lead them into these
22 organizations.

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1 Q But, isn't it true that you have
2 no outpouring of your members for a choice
3 because they're not aware that there is a
4 choice?

5 A No, I couldn't say that.

6 Q Are they aware that there's a
7 choice, Mr. Lee?

8 A I -- I don't know if they are
9 aware that there's a choice or not.

10 Q Have you made them aware that
11 there's a choice?

12 A I have not.

13 Q Has anyone at AF of M to your
14 knowledge made them aware that there's a
15 choice?

16 A We have not.

17 Q Okay. Do you think that your
18 members would turn down advances and
19 guarantees if they were offered to them?

20 A Advances and guarantees?

21 Q Yes, monies paid as advances
22 against the statutory royalties or

1 guarantees of payment of these royalties
2 regardless of whether they actually get
3 earned or not.

4 A I -- I think there is a lot of
5 potential what ifs available. I don't see
6 that as -- as a potential for taking place.
7 I would caution them very strongly about
8 working with an organization that's going to
9 make them guarantees and give them advances.

10 Q Why is that?

11 A Well -- well, I'll tell you.
12 From the testimony that I read, MRI is the
13 parent of RLI. RLI is wholly owned by MRI.
14 MRI from the testimony I read deals
15 primarily with copyright users.

16 That's a big concern for me
17 because that to me is a conflict of interest
18 for my members and I would have to say that
19 to them.

20 In addition to that, the same
21 employees, the same staff, the same board of
22 directors, Mr. Gertz and -- and two of, I

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1 assume, business associates are -- are part
2 of the governance. There is no artist
3 input. There is no artist governance or
4 control. It is a for-profit making company.

5 For those reasons alone, I would
6 in all good intentions have to counsel my
7 folks that you are not potentially going to
8 get a very good deal here. Because if they
9 aren't involved in all these other
10 proceedings, they're not representing your
11 interest.

12 Q And do you based that on having
13 read Mr. Gertz' direct testimony in this
14 case?

15 A Those are the basis for the
16 observations I just --

17 Q So, you read Mr. Gertz' direct
18 testimony. You concluded that going with
19 RLI would not be in your member's best
20 interest?

21 A I would not be able to recommend
22 that my interest -- my members do that.

1 That's right.

2 Q Have you told the members of the
3 board of AF of M that your testimony here
4 supports a single monopoly rather than
5 competition in collective licensing?

6 A The members of the board of the
7 AFM are updated on a quarterly basis at our
8 quarterly meetings. They are fully aware of
9 the AFM's involvement with SoundExchange.
10 From the very beginning, they have been
11 informed on a regular basis of what is
12 taking place and I did tell the board as
13 recently as November the 31st I think was
14 our last meeting that I would be testifying
15 here in this CRB.

16 Q Testifying in support of a single
17 monopoly collective?

18 A Yes.

19 Q Now, if you had two collectives,
20 Mr. Lee, one that's for-profit and one
21 that's not-for-profit and one of these
22 companies was able to offer the same

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1 services for a lower cost meaning and
2 increased net distribution to performers, to
3 your members, wouldn't it be rational and
4 prudent for those members to choose the
5 lower-cost alternative to maximize their
6 royalties?

7 A Again, there are a lot of other
8 factors that are involved in that. You
9 know, how much has the other company been
10 involved in the proceedings? How much is
11 the other company actually looking out for
12 their interest? What kind of demonstrations
13 have been -- have taken place in other
14 company that they are involved in -- in --
15 in collecting the most money they can and
16 representing that the rate should be as high
17 as it can?

18 Those are the kind of things that
19 I would take into consideration before I
20 could possibly recommend.

21 Q Wouldn't you as the president of
22 the AFM want to see your 2½ percent, the 2½

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1 percent that goes directly to you be
2 calculated from the greatest possible next
3 royalty pool?

4 A Absolutely.

5 Q Are the members of Metallica
6 members of your union, Mr. Lee?

7 A I am sure that -- that -- well, I
8 don't know about those members specifically.
9 So, let me state that and -- and if you ask
10 me names of groups, I would have to go back
11 and check, you know, our roster.

12 What I can say with a great deal
13 of certainty that probably 98 percent of the
14 biggest names in the country that are
15 playing musicians are members of our
16 organization.

17 Q And if the playing members of
18 Metallica recorded for a major label and
19 have sold millions if not tens of millions
20 of records, would it be likely that they're
21 AFM members?

22 A I would think so.

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1 Q And are you aware that Metallica
2 has designated RLI as their collective for
3 Section 112 and 114 royalties?

4 A No, I am not.

5 Q And if -- okay. Are you
6 advocating a position that would strip
7 Metallica and any other persons and labels
8 that have chosen RLI of their right to the
9 agent that they have chosen in this area?

10 A What I'm advocating is the
11 position that there are -- not the position,
12 but under the fact that there are always
13 going to be some people who will not agree
14 with the vast majority of members that we
15 have that are receiving royalties and that
16 takes place whether it's collective
17 bargaining. It takes place whether it's
18 ratification. There will always be a small
19 group of individuals who say, you know,
20 that's not where I'm going. That's not
21 where I'm headed.

22 And I have to say to those

1 individuals the same as I would say to that
2 group that's ratifying a collective
3 bargaining agreement and those small groups
4 that didn't ratify it, you know, we are in a
5 -- a society where it's a democratic
6 society. You can come and talk to me. You
7 can speak to me. You can tell me your point
8 of view. I will take it into consideration,
9 but we are absolutely going to have to
10 operate on the basis of the most good for
11 the most people.

12 Q But, in a democratic society,
13 what benefit would it be to your AFM members
14 on a whole to create a monopoly and take
15 away their choice of collectives in this
16 area?

17 A The benefit --

18 MR. HANDZO: At this point, I
19 think I'm going to object to -- this is a
20 hypothetical and basically closing argument.
21 It doesn't strike me that this is
22 appropriate cross examination.

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1 CHIEF JUDGE SLEDGE: Has that not
2 been answered, Mr. Freundlich?

3 MR. FREUNDLICH: I may have asked
4 in a different way. Is it your recollection
5 that the question was answered?

6 CHIEF JUDGE SLEDGE: That's
7 right.

8 MR. FREUNDLICH: I'll ask another
9 one.

10 CHIEF JUDGE SLEDGE: At least
11 once.

12 MR. FREUNDLICH: I'll ask another
13 question.

14 CHIEF JUDGE SLEDGE: All right.

15 BY MR. FREUNDLICH:

16 Q Now, as part of your testimony --
17 written testimony about the conflicts that
18 you perceive with RLI, are you aware that
19 Ron Gertz testified in Web 1, you quoted
20 from Web 1 in your statement --

21 A Okay.

22 Q -- to the fact that it's been

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1 acknowledged in the marketplace that the
2 rate charged for a synch license to the
3 publishers is the same as a one-to-one ratio
4 as the rate charged by the sound recording
5 copyright holders?

6 A I may have read something about
7 that. I did not spend a lot of time
8 studying that issue.

9 Q So, it's not -- you haven't based
10 your testimony in anyway here on the fact
11 that Mr. Gertz or Ms. Ulman were testifying
12 as to the one-to-one relationship?

13 A Oh, yes. Yes, please point me to
14 the -- to the reference you have. I think I
15 can find it maybe as quickly as --

16 Q It's page 7c as we were talking
17 about conflicts.

18 A Yes.

19 Q Mr. Gertz testified. Looked at
20 top of page 8. Well, it doesn't
21 specifically say what the testimony was, but
22 you're referring to testimony of Ms. Ulman

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1 about the one-to-one ratio. Are you not?

2 A Yes, I am and I do recall. I --
3 I did -- I did review that -- that document.
4 Yes.

5 Q Are you aware, Mr. Lee, that in
6 this proceeding Mr. Simson himself testified
7 as to the correctness of the one-to-one
8 ratio that Mr. Ulman and Mr. Gertz testified
9 to?

10 A I am not aware of Mr. Simson's
11 testimony.

12 Q RLI 16. I'd like you to look at
13 page 339 is the lower right-hand quadrant.

14 A Yes, sir.

15 (Whereupon, the document
16 was marked as RLI
17 Exhibit 16 for
18 identification.)

19 BY MR. FREUNDLICH:

20 Q Mr. Simson's testimony where I've
21 asked him "And I think you testified before
22 that in normal circumstances I think you

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1 said with a couple of exceptions your
2 experience is that the publisher and
3 licensing of synch right will get equivalent
4 compensation to the labeler who is the
5 licensing the master use right. Correct?"

6 And Mr. Simson says "That's correct."

7 Do you see that?

8 A Yes, I do.

9 Q So, isn't it a fact then that Mr.
10 Simson testified to the same fact that
11 you're saying constitutes evidence of an
12 outrageous conflict of interest?

13 A I don't believe so, but I would
14 like to talk with Mr. Simson and you know.

15 Q Isn't that the fact that he
16 testified to though, Mr. Lee?

17 A Apparently these are the words
18 that are written on the -- on this -- this
19 piece of paper. Yes, and I -- and I accept
20 --

21 CHIEF JUDGE SLEDGE: I don't know
22 if everybody's else copy, but on the copy

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1 you gave me, the part you're quoting is
2 marked out where you can't read it.

3 MR. FREUNDLICH: What part of it
4 can't you read, Your Honor?

5 CHIEF JUDGE SLEDGE: It's --

6 MR. FREUNDLICH: I mean it's --
7 it's --

8 CHIEF JUDGE SLEDGE: -- got
9 markings over the top it. Is marked out
10 what you have read. I don't know how you
11 can --

12 MR. FREUNDLICH: I have the same
13 copy.

14 JUDGE ROBERTS: You tried
15 highlighting, Mr. Freundlich?

16 MR. FREUNDLICH: I think I may
17 have used something that made the first
18 lines a little bit blurred, but you can
19 still read what it says.

20 CHIEF JUDGE SLEDGE: I cannot. I
21 don't know if anyone else can or not, but
22 it's -- when it's marked out, I can't read

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1 it.

2 MR. FREUNDLICH: Okay. Well, if
3 we start from line 13 then where there's no
4 mark out. It says your experience -- it
5 says on line 13, forgetting the part that is
6 difficult to read, it says "Your experiences
7 at the publisher and licensing of synch
8 right will get equivalent compensation to
9 the label who is licensing the master-use
10 right. Correct?" And then Mr. Simson says
11 "That's correct."

12 I think --

13 CHIEF JUDGE SLEDGE: I can read
14 that.

15 MR. FREUNDLICH: Right. I think
16 the point was made in that portion of it.

17 THE WITNESS: Well, I didn't base
18 my testimony on this. I based my testimony
19 on the documents that are referenced and
20 with those documents, I think my statement
21 is correct.

22 BY MR. FREUNDLICH:

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1 Q Would you say that Mr. Simson
2 testified there against the interest of his
3 company and in favor of the webcasters when
4 he testified as to the one-to-one ratio or
5 was it merely a statement by all three
6 parties, Mr. Simson, Ms. Ulman and Mr. Gertz
7 of an established industry-wide fact?

8 A Mr. Freundlich, before I made
9 comments on this, I would like to read the
10 entire testimony so that I have an
11 understanding of -- of -- of how it flowed
12 and the kind of questions that preceded and
13 the kind of questions that come up
14 afterwards. I hope you can appreciate that.

15 Q Fair enough. So, you can't
16 answer the question?

17 A I don't want to answer the
18 question and I will do that as soon as I had
19 a chance to review that testimony.

20 Q Okay. Just a few more areas, Mr.
21 Lee.

22 A Sure.

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1 Q Isn't it true, Mr. Lee, that --

2 A Errors or areas?

3 Q Areas. Areas.

4 A Yes. Okay.

5 Q I'm sorry. Isn't it true, Mr.
6 Lee, that in a competitive environment, if
7 as you say at the top of page 6 of your
8 statement, RLI puts its business interests
9 before the concerns of performers, that it
10 has, using your words, a conflict of
11 interest, then RLI will not be able to
12 attract members?

13 If those things that you say are, in fact,
14 true and they have a conflict of interest,
15 then they won't be able to attract any
16 members. Will they?

17 A I would suggest that I -- people
18 join organizations for a bunch of different
19 reasons. People buy products for a bunch of
20 different reasons. Sometimes it doesn't
21 make any sense to me why people buy certain
22 products or join certain organizations.

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1 If the question is would RLI be
2 able to convince people to become part of
3 their organization, they may very well be
4 able to or they may not be able to.

5 My recommendation thought would
6 be that a business -- a for-profit business
7 is not going to look out for their
8 interests.

9 Q And if Royalty Logic is, in fact,
10 laden with these conflicts of interests
11 that you refer to, won't that insure that
12 SoundExchange will wind up getting most of
13 the business?

14 A In my view -- in my view, you
15 have an artist board that represents the
16 people that this money goes to. You have
17 the copyright owners that represent the
18 people that this money goes to.

19 There is no greater interest in
20 keeping cost down than a copyright owner or
21 a record label who looks at -- at -- at you
22 and says, you know, that money can go in

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1 your pocket or it can go in my pocket. I'm
2 going to put it in my pocket. There is the
3 greatest incentive possible --

4 Q Okay.

5 A -- for the performers and record
6 labels to keep the cost down.

7 Q I understand that you feel that
8 way, Mr. Lee.

9 A Thank you.

10 Q But, isn't it a fact that it
11 would be a healthier choice for your -- it
12 would be healthier for your clients for the
13 competition between Royalty Logic and
14 SoundExchange to provide them with a choice
15 here?

16 MR. HANDZO: Your Honor, I --

17 JUDGE ROBERTS: Mr. Freundlich,
18 you've asked that question several times. I
19 think we have an answer to that.

20 BY MR. FREUNDLICH:

21 Q Now, a few questions about the AF
22 of M.

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1 A Sure.

2 Q Is it true that the principal
3 parties that AFM negotiates with over sound
4 recordings and union participation are the
5 sound recording copyright holders who are
6 the members of SoundExchange and of the
7 Recording Industry Association of America?

8 A That's -- that's -- yes, that's
9 predominately true.

10 Q Now, Mr. Lee, you're aware of the
11 -- of a list that was published in September
12 of 2006 of this year covering royalties owed
13 going back as far as ten years ago by
14 SoundExchange?

15 A I don't recall seeing that list,
16 but I take your word for it that it was
17 published.

18 Q When did you first -- are you
19 aware of the existence of the list? You may
20 not have seen the list.

21 A Yes. Yes.

22 Q Do you know what it is? When did

1 you first become aware of it?

2 A I generally became aware over the
3 past few months.

4 Q Do you think it was reasonable
5 for the SoundExchange board to hold this
6 list in secret for ten years?

7 A Well, I think there may be a
8 number of extenuating circumstances that
9 made that fall into place.

10 First of all, I don't have a
11 knowledge and I'm not here to speak about
12 understanding the information that is
13 suppose to be provided to SoundExchange in
14 order for it to distribute the money, but I
15 would just suggest that if, in fact, that
16 list was held for ten years, it was in the
17 interest of the individuals and trying to
18 find the individuals to whom the money was
19 owed and there may be very good reasons why
20 that has taken place. I can't speak to
21 that.

22 Q But, you would agree, would you

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1 not, that SoundExchange could have published
2 the list five years ago?

3 A Again, I don't know if that's the
4 case.

5 Q Did the AFM ever consider
6 distributing this list to its member?

7 A I don't think that we ever
8 distributed the list to our members. I know
9 that we have used our database. AFTRA has
10 used their database. We've used databases
11 from a number of -- of -- of our own
12 internal databases in order to insure that
13 SoundExchange could look at those databases
14 to -- to be able to find members.

15 Q You're aware, are you not, that
16 SoundExchange has stated its intention to
17 escheat these royalties in December of 2006
18 to itself?

19 A That is the royalties that they
20 have -- could have escheated two years ago.

21 Q Right.

22 A But, have been continuously

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1 looking for two years beyond the time when
2 they could have escheated that money.

3 I -- I am aware that some of that
4 money will be escheated. Yes.

5 Q And was that decision that --
6 when you testified earlier about that
7 decision to extend --

8 A Yes.

9 Q -- the three year, were you on
10 the board when that happened?

11 A I -- you know, no, I was not.
12 You know, I think I was on the board for the
13 first. I don't think I was on the board the
14 second year.

15 Q But, it was a policy decision of
16 the board not to enforce the three years and
17 to extend the courtesy, if you will, to the
18 performers and copyright holders of not
19 escheating their money?

20 A Correct.

21 Q Okay. Now, as the head of the AF
22 of M, wouldn't you have liked to have seen

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1 the list published five years ago for
2 instance?

3 A That would have probably -- if --
4 if -- you know, assuming that -- well, not
5 understanding why the list wasn't published
6 or not having any reasons and I'm sure there
7 were some reasons, I'd certainly like to
8 know that. But, I generally am in favor,
9 yes, of making members aware that they may
10 have money coming to them.

11 Q Now, isn't it true, Mr. Lee, that
12 if the list had been published earlier that
13 competitors here could have come in to fill
14 the obvious need for more outreach?

15 A I don't know that.

16 Q And isn't it true that the list
17 was, in fact, kept secret to avoid there
18 being any competition and to protect
19 SoundExchange's monopoly?

20 A I do not know that to be the
21 case.

22 Q Just a few questions about Roman

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1 Numeral IV which begins on page 9.

2 A IV?

3 Q What is the source? For
4 instance, you say a multiple agent system
5 would be wasteful and inefficient. What is
6 the source of your statement of that nature?

7 A And -- and where am I saying that
8 on page 9?

9 Q This is the bottom of page 9.

10 A Bottom of the page. Yes, I think
11 that's a conclusion that I made based on the
12 information that was available to me at the
13 time that this was written.

14 Q Did you read this statement and
15 perhaps the statement in the next paragraph
16 that says the majority would not choose to
17 pay for what you're calling a duplicative
18 and complicated system? Did you read that
19 stuff in Ms. Kessler's testimony?

20 A I don't know if I read that in
21 her testimony or not. It's a statement that
22 I believe. I mean I -- I would have to go

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1 back and look at the testimony to find
2 exactly where, you know, these things came
3 from.

4 Q Did you read Ms. Kessler's
5 testimony carefully before the statement?

6 A I did.

7 Q Have you done any investigation
8 at all as to the cost structure that RLI
9 intends to implement in this arena?

10 A I have not.

11 Q Do you think that you'd be
12 fulfilling your responsibilities to the AFM
13 if you didn't at least investigate the
14 alternatives?

15 A Mr. Freundlich, I truly believe
16 everything that I have said and that is that
17 with -- with a nonprofit being controlled by
18 the very individuals to who the money is
19 entitled to go to, that there is no ability
20 for a for-profit company that is associated
21 with broadcasters and has, in fact,
22 testified on behalf of broadcasters. There

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1 is no purpose for me to investigate. I see
2 the conflict of interest.

3 Q Thank you, Mr. Lee. I don't have
4 anything further.

5 A Thank you, Mr. Freundlich.

6 CHIEF JUDGE SLEDGE: Any further
7 questions by SoundExchange?

8 MR. HANDZO: No, Your Honor.

9 CHIEF JUDGE SLEDGE: Any
10 questions from the Bench?

11 Mr. Lee, your statement does not
12 give your rank in the Marine Corps.

13 THE WITNESS: Master Gunnery
14 Sergeant, sir. It was a terrific career.

15 CHIEF JUDGE SLEDGE: Sergeant
16 Lee, that completes your testimony. Thank
17 you.

18 THE WITNESS: Thank you very
19 much.

20 (Whereupon, the witness was
21 excused.)

22 MR. HANDZO: Your Honor, I

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1 believe we are going to pick up tomorrow
2 with the testimony. I think we're starting
3 with Mr. Ciongoli followed by Mr. Roland.

4 CHIEF JUDGE SLEDGE: All right,
5 sir. We recess until 9:30 in the morning.

6 (Whereupon, the hearing was
7 adjourned to reconvene tomorrow at 9:30
8 a.m.)
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John Mongoven